Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to	)	
Section 10 of the Communications Act of 1934, as	)	
Amended (47 U.S.C. § 160(c)), for Forbearance	)	WC Docket No. 06-109
from Certain Dominant Carrier Regulation of Its	)	
Interstate Access Services, and for Forbearance	)	
from Title II Regulation of Its Broadband Services,	)	
in the Anchorage, Alaska, Incumbent Local	)	
Exchange Carrier Study Area	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2007 **Released: August 20, 2007**

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein concurring in part, dissenting in part and issuing a joint statement.

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I. INTRODUCTION

1. In this order, we address a forbearance petition filed by ACS of Anchorage, Inc. (ACS) on May 22, 2006[1] pursuant to section 10 of the Communications Act of 1934, as amended (Communications Act, or the Act) in which it seeks forbearance from certain statutory and regulatory obligations that apply to it as a former monopoly telephone company.[2] ACS asserts that it seeks forbearance comparable to: (1) the relief that the Commission granted to Qwest Corporation (Qwest) in the Omaha Metropolitan Statistical Area (MSA);[3] and (2) the relief granted to the Verizon Telephone Companies (Verizon) by operation of law on March 19, 2006.[4] We grant the petition in part, and forbear from applying certain dominant carrier regulation to ACS's provision of interstate switched access services in the Anchorage, Alaska incumbent local exchange carrier (LEC) study area (Anchorage study area or Anchorage). We also grant its request for forbearance for mass market broadband Internet access transmission service and grant in part for certain specified enterprise broadband services that ACS offers in the Anchorage study area ACS's request for forbearance from Title II and *Computer Inquiry* requirements. These grants of

[1] Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109 (filed May 22, 2006) (ACS Petition or Petition).

[2] 47 U.S.C. § 160. Section 10 was added to the Communications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

[3] ACS Petition at 3; *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19424-38, paras. 15-50 (2005) (*Qwest Omaha Order*), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[4] ACS Petition at 6; *see also Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (rel. Mar. 20, 2006) (Verizon-Related News Release); Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (filed Dec. 20, 2004) (Verizon Forbearance Petition); Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 7, 2006) (Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter); Letter from Susanne Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 17, 2006) (Verizon WC Docket No. 04-440 Feb. 17, 2006 *Ex Parte* Letter). Appeals of this result currently are pending in the United States Court of Appeals for the District of Columbia Circuit. *See Sprint Nextel Corp. v. FCC*, Docket No. 06-1111 (D.C. Cir. filed Mar. 29, 2006).

forbearance are subject to certain conditions described below. We otherwise deny ACS's requested relief.

2. More generally, ACS states that it seeks relief similar to that which certain price cap carriers have obtained in previous forbearance proceedings. Its petition, however, raises novel issues because ACS is a rate-of-return carrier, rather than a price cap carrier. In requesting forbearance subject to certain conditions, ACS essentially is seeking to implement an alternative regulation plan for the Anchorage study area. The Commission has identified concerns that must be addressed before rate-of-return carriers' services are deregulated. For example, section 254(k) of the Act states that a telecommunications carrier "may not use services that are not competitive to subsidize services that are subject to competition."[5] Likewise, in the *Wireline Broadband Internet Access Services Order*, the Commission found that in particular for rate-of-return carriers, treating wireline broadband Internet access transmission services as free from Title II regulation would require the allocation of regulated costs among Title II-regulated and non-Title II regulated services.[6] Consequently, regulatory relief from pricing regulations presents difficult challenges in the rate-of-return context. These challenges must be addressed regardless of whether such relief from pricing regulation is adopted in the rulemaking or forbearance context to ensure that the relief does not have harmful consequences for ratepayers, as well as for universal service.

3. Based on the exceptional circumstances presented in the record of this proceeding, and the statutory goal of deregulation, we find that granting ACS a portion of the conditional relief it seeks is justified. One critical factor, as discussed below, is the evidence that ACS faces extraordinary facilities-based competition in the Anchorage market. Indeed, we observe that the Regulatory Commission of Alaska (Alaska Commission) itself has granted ACS significant pricing freedom with respect to intrastate rates in light of this competition,[7] and the Commission likewise previously has granted relief from pricing regulation based on unique factors in Anchorage.[8] We note that critical to our grant of additional relief are the conditions proposed by ACS and adopted today, which, among other things, will prohibit ACS

[5] 47 U.S.C. § 254(k).

[6] *See*, *e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14926-27, paras. 135-38 (2005) (*Wireline Broadband Internet Access Services Order*), *petitions for review pending, Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005). The rates of price cap carriers are governed by their price cap index and actual price index calculations, which are unrelated to the carriers' earnings. Additionally, when a price cap carrier exercises pricing flexibility, it is prohibited thereafter from making a low-end adjustment in any portion of its service region. 47 C.F.R. § 69.731. This prohibition limits the ability of such carrier to use a reduction in earnings to increase its price cap index and consequently its rates. We note that, although extremely rare, price cap carriers retain the right to make an above cap filing. *Id*. § 61.45(g). Any such filing would have to be justified with a cost showing that demonstrated a reasonable allocation of regulated costs among the services granted Title II relief in the *Wireline Broadband Internet Access Services Order* and a carrier's other regulated services. *See Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14927, para. 137.

[7] ACS Petition at 54.

[8] *ATU Telecommunications Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules*, CPD 98-40, Order, 15 FCC Rcd 20655 (2000).

from increasing its interstate rates for switched access services either generally or for specific rate elements, and will require ACS to withdraw from the National Exchange Carrier Association (NECA) pooling functions and NECA tariffs for the Anchorage study area. Moreover, both by virtue of its commitment, adopted as a condition of forbearance, and by virtue of the Commission's forbearance from rate-of-return regulation for ACS in Anchorage, ACS no longer will have the ability to seek rate increases based on underearnings under the rate-of-return framework with respect to the categories of services for which we grant pricing relief. Further, universal service support under the Interstate Common Line Support (ICLS) mechanism for all eligible telecommunications carriers (ETCs) in Anchorage, including ACS, will be distributed on a per-line basis at the current competitive ETC per-line level.[9] Our decision is also influenced by the fact that General Communication Inc. (GCI), ACS's primary competitor in the Anchorage market, supports ACS's proposal for conditional forbearance from dominant carrier regulation of switched access services, which we adopt today. Each of these factors, in addition to the others discussed below, is critical to our finding that forbearance meets the statutory criteria.

II. SUMMARY OF RELIEF GRANTED

4. In accordance with our responsibilities under the Act, and in light of the evidence and the conditions we adopt in this order, we grant ACS's Petition in part and deny it in part and take the following actions:

- *Interstate Switched Access Services*: We forbear from the application of the rate-of-return, tariffing, discontinuance, and transfer of control regulations that apply to dominant carriers, subject to certain conditions described below.

- *Broadband Internet Access Transmission Services*: We grant ACS forbearance for its broadband Internet access transmission service, subject to a cost allocation condition described below.

- *Interstate Special Access Services*: We deny ACS's Petition to the extent it seeks forbearance from dominant carrier regulation of its interstate special access services generally.

- *Specified Enterprise Broadband Services*: We grant in part and deny in part ACS's request for forbearance from Title II and *Computer Inquiry* requirements for certain interstate enterprise broadband services, subject to certain conditions. In all other respects, ACS's Petition is denied.

5. For the reasons discussed below, we impose the following conditions on our grant of forbearance relief with respect to ACS's interstate switched access services. Specifically, we require ACS to:

- Cap at current levels all of its switched access and end-user rate elements at the benchmark that applies to all of its competitors – ACS's tariffed rate as of June 30, 2007.

- Comply with the interstate access charge rules applicable to competitive LECs, with the exception that ACS must file tariffs for switched access and end-user rates, which may be done on one day's notice,[10] subject to the rate caps identified in this order.

[9] We also find other conditions to be warranted, as described below.

[10] As explained below, if ACS files tariffs on seven or 15 days notice, it will receive deemed lawful treatment for those rates, similar to competitive LECs.

- File all contract offerings that include charges for switched access and/or end-user services as contract tariffs.
- Comply with our nondominant discontinuance and transfer of control rules.
- Exit the NECA common line pooling process and tariffs for the Anchorage study area.
- Receive universal service support under the ICLS mechanism on a per-line basis at the current competitive ETC per-line level.
- Contribute to universal service based on the June 30, 2007 subscriber line charge (SLC) rates.
- Maintain the allocation of common costs assigned to ACS and its affiliates located outside of Anchorage at current levels.

6. In addition, to avail itself of the granted forbearance relief for mass market and enterprise broadband services, ACS first must file, and have approved by the Commission, a description of how it will properly allocate the costs for these services to address the cost shifting concerns raised by that forbearance.[11]

III. BACKGROUND

A. Regulatory Requirements

7. Title II of the Act and the Commission's implementing rules impose both economic and non-economic regulation on common carriers. The most extensive regulations are imposed on dominant carriers (*i.e.,* those with individual market power). These carriers are subject to price cap or rate-of-return regulation, and must file tariffs for many of their interstate telecommunications services – on either seven or 15 days' notice – and usually with supporting data.[12] In contrast, nondominant carriers generally are not subject to direct rate regulation and may file tariffs, on one day's notice and without cost support, that are presumed lawful.[13] In addition, applications to discontinue, reduce, or impair service are subject to a 60-day waiting period for dominant carriers, as opposed to a 30-day period for nondominant carriers.[14] Finally, dominant carriers must follow more stringent procedures under section 214 of the Act for certain types of transfers of control, while nondominant carriers are accorded presumptive streamlined treatment.[15]

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[11] In addition, ACS must comply with our nondominant discontinuance and transfer of control rules with respect to its enterprise broadband services.

[12] *See* 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997); *see also Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14241, para. 40 (1999) (allowing price cap LECs to file tariffs for new services on one day's notice), *aff'd WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[13] 47 C.F.R. §§ 1.773(a)(ii) and 61.23(c); *Tariff Filing Requirements for Nondominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995) (*Nondominant Tariff Filing Order*).

[14] 47 C.F.R. § 63.71(c).

[15] *Id*. § 63.03(b).

8. The Act and the Commission's rules also impose certain regulation on common carriers or LECs generally, regardless of whether they are incumbents or competing carriers, and regardless of their classification as dominant or nondominant. For instance, Title II places a duty on all common carriers engaged in interstate or foreign communication by wire or radio to provide such communications services upon reasonable request and at rates and on terms and conditions that are just, reasonable, and not unjustly or unreasonably discriminatory.[16] In addition, all telecommunications carriers must interconnect directly or indirectly with the facilities and equipment of other common carriers.[17] All LECs, in turn, have a number of additional duties, such as the duty not to impose unreasonable or discriminatory conditions or limitations on resale of their telecommunications services,[18] and the duty to provide competing telecommunications services providers with access to the LECs' poles, ducts, and conduits under just and reasonable rates, terms, and conditions.[19]

9. The Act and the Commission's rules impose additional obligations on incumbent LECs or on independent incumbent LECs. Incumbent LECs, in particular, must meet the interconnection, collocation, and other obligations set forth in section 251(c) of the Act and the Commission's implementing rules.[20] Independent incumbent LECs, including ACS, moreover, are subject to certain structural separation requirements if they wish to provide in-region, interstate, interexchange telecommunications services other than through resale.[21]

10. In addition to the economic regulation described above, Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public policy goals and to protect consumers. These include requirements that carriers contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis,[22] ensure access to telecommunications services by people with disabilities,[23] meet standards regarding the privacy of their customers' information,[24] and facilitate the delivery of emergency services.[25] All common carriers, moreover, are subject to a formal complaint process under which any person may complain to the Commission about anything the carrier may do that is contrary to the provisions of the Act.[26]

11. ACS also is subject to certain *Computer Inquiry* requirements. Specifically, in the *Computer II* proceeding,[27] in response to the convergence and increasing interdependence of computer and

[16] 47 U.S.C. §§ 201, 202.

[17] *Id*. § 251(a)(1).

[18] 47 U.S.C. § 251(b)(1).

[19] *Id*. §§ 224, 251(b)(4).

[20] 47 U.S.C. § 251(c).

[21] *See* 47 C.F.R. § 64.1903.

[22] 47 U.S.C. § 254(d).

[23] *Id*. § 225.

[24] *Id*. § 222(a)-(c), (f).

[25] *Id*. § 222(d)(4), (g).

[26] *Id*. § 208.

[27] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Docket No. 20828, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon*., 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon*., 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd* (continued….)

telecommunications technologies, the Commission established a regulatory framework that distinguished between "basic services" and "enhanced services."[28] The Commission determined that enhanced services were not within the scope of its Title II jurisdiction but rather were within its ancillary jurisdiction under Title I of the Communications Act.[29] To protect against anti-competitive behavior, the Commission, pursuant to this ancillary jurisdiction, required facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act.[30] ACS thus must offer the underlying basic service at the same prices, terms, and conditions, to all enhanced service providers, including its own enhanced services operations.[31] We note that ACS's *Computer Inquiry* obligations are much less extensive than those imposed on the Bell Operating Companies (BOCs).[32]

B. Prior Regulatory Relief

1. Qwest Omaha Order

12. On September 16, 2005, the Commission adopted an order granting in part and denying in part a forbearance petition filed by Qwest, which sought forbearance from certain section 251 and other obligations with respect to Qwest's operations in the Omaha MSA.[33] In the *Qwest Omaha Order*, the

(Continued from previous page)
sub nom. Computer and Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II*).

[28] The Commission defined basic services as the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 FCC 2d at 415-16, 420, paras. 83, 96. Enhanced services, in turn, were defined as services that "combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387, para. 5. In other words, an "enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* at 420, para. 97. Although the Commission used the term "enhanced service" in its *Computer Inquiry* decisions and the Act uses the term "information service," the Commission has determined that "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [the] *Computer II* proceeding . . . ." *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992-94 (2005) (*NCTA v. Brand X*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998).

[29] *See*, *e.g.*, *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

[30] *Id.* at 475, para. 231; *see id.* at 435, para. 132 (discussing jurisdictional basis for the Commission's *Computer II* actions); *see also CCIA v. FCC*, 693 F.2d at 211-14 (affirming the Commission's reliance on its ancillary jurisdiction in imposing structural safeguards on AT&T's provision of enhanced services); *NCTA v. Brand X*, 545 U.S. at 995-97 (describing *Computer II* and stating that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

[31] *See CCIA v. FCC*, 693 F.2d at 205; *see also Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231. We note that the *Computer II* "unbundling" of basic services requirement is separate and distinct from the obligation, in section 251(c)(3) of the Communications Act, that incumbent LECs to provide access to unbundled network elements (UNEs). 47 U.S.C. § 251(c)(3).

[32] *See*, *e.g.*, *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14866-71, paras. 21-29.

[33] *See*, *e.g.*, *Qwest Omaha Order,* 20 FCC Rcd at 19416, para. 2; *see also* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004).

Commission held that section 251(c)(3) had been "fully implemented" nationwide[34] and granted Qwest forbearance from Qwest's section 251(c)(3) unbundling obligations in nine of the 24 wire centers in the Omaha MSA. The Commission premised its relief on the state of competition and the level of competitive facilities deployment in those nine wire centers, as well as the presence of certain other regulatory safeguards, such as continued availability of section 251(c)(4) resale and section 271 access obligations.[35]

13. Of particular relevance in the instant proceeding, the Commission also granted Qwest forbearance in part from the application of certain dominant carrier regulation in the Omaha MSA. Specifically, the Commission forbore from applying its price cap, rate-of-return, tariffing, and 60-day discontinuance and transfer of control rules to Qwest's interstate mass market exchange access services and mass market broadband Internet access transmission services in the Omaha MSA.[36] The Commission denied forbearance relief with respect to Qwest's enterprise telecommunications services, because Qwest had failed to provide sufficient information to meet the statutory forbearance criteria.[37]

2. ACS UNE Order

14. Prior to filing its petition in the instant proceeding, ACS filed a petition with the Commission seeking relief from section 251(c)(3) unbundling obligations similar to that granted to Qwest in the *Qwest Omaha Order*.[38] On December 28, 2006, the Commission, in the *ACS UNE Order*, granted in part ACS's petition for forbearance from section 251 unbundling. Subject to certain specific conditions, the Commission granted ACS forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to sections 251(c)(3) and 252(d)(1) in those portions of its service territory in the Anchorage study area where it found that ACS's main competitor in the Anchorage study area, GCI, had substantially built out its network.[39] First, the Commission granted ACS relief from section 251(c)(3) unbundling obligations and section 252(d)(1) pricing obligations in the five of the 11 wire centers in the Anchorage study area where it found that the level of facilities-based competition by GCI ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary. Second, as a condition of the order, the Commission required ACS to make loops and certain subloops available in those five wire centers, by no later than the end of the transition period, at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until

[34] *Qwest Omaha Order*, 20 FCC Rcd at 19440, para. 53 (concluding that section 251(c) is "fully implemented" because the Commission has issued rules implementing section 251(c) and those rules have gone into effect).

[35] *See id.* at 19446, para. 62; *see also* 47 U.S.C. §§ 251(c)(4) (resale obligation), 271(c)(2)(B) (competitive checklist).

[36] *See Qwest Omaha Order,* 20 FCC Rcd at 19424, para. 15.

[37] *Id.* at 19426, para. 19.

[38] Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281 (filed Sept. 30, 2005).

[39] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959, para. 1 (2007) (*ACS UNE Order*), *appeals dismissed*, *Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); *see also Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting ACS of Anchorage, Inc. Forbearance Relief in the Anchorage, Alaska Study Area*, WC Docket No. 05-281, Public Notice, DA 07-3041 (rel. July 6, 2007) (ACS Coverage Public Notice) (noting that the Commission targeted relief to wire centers where GCI had at least 75 percent coverage).

commercially negotiated rates are reached. Third, the Commission provided for a one-year transition period before the forbearance grant takes effect.[40] Since that time, ACS and GCI reached an agreement, whereby ACS will continue to provide access to the specified elements in the Anchorage study area for at least five years.[41]

3. Prior Broadband Relief

15. In previous orders, the Commission has taken a number of other important steps aimed at easing the regulatory requirements for broadband facilities and services. Specifically, in the *Triennial Review Order*, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including fiber-to-the-home (FTTH) loops in greenfield situations, broadband capabilities of FTTH loops in overbuild situations, the packet-switched capabilities of hybrid loops, and packet switching.[42] In making its determination, the Commission considered, among other things, the directive of section 706 of the 1996 Act that it provide incentives for investment in broadband facilities, and concluded that these facilities should not be unbundled.[43] In subsequent reconsideration orders, the Commission extended this same unbundling relief to encompass fiber loops serving

[40] *ACS UNE Order*, 22 FCC Rcd at 1960, para. 2.

[41] Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed May 24, 2007) (ACS May 24, 2007 *Ex Parte* Letter); *see also* Letter from Karen Brinkmann *et al.*, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed June 29, 2007) (ACS June 29, 2007 *Ex Parte* Letter).

[42] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, 17321-23, paras. 272-95, 537-41 (2003) (*Triennial Review Order*), *corrected by Triennial Review Order Errata*, 18 FCC Rcd 19020, 19022, para. 26, *vacated and remanded in part*, *aff'd in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004), *cert. denied, National Ass'n Regulatory Util. Comm'rs v. U.S. Telecom Ass'n,* 125 S. Ct. 313, 316, 345 (2004), *on remand*, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *aff'd sub nom.*, *Covad Commc'ns. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[43] *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44. Section 706 states, in pertinent part:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"Advanced telecommunications capability" is defined . . .

> without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

47 U.S.C. § 157 nt.

predominantly residential multiple dwelling units (MDUs) and to fiber-to-the-curb (FTTC) loops.[44] Moreover, in the *Broadband 271 Forbearance Order*, the Commission granted the BOCs forbearance relief from the requirements of section 271 specifically for the broadband elements for which it had granted unbundling relief under section 251.[45] The Commission applied its section 10 forbearance analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.[46]

16. In the *Wireline Broadband Internet Access Services Order*, the Commission, among other things, generally eliminated the Title II and *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.[47] The Commission granted this relief for wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, a FTTC or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities.[48] The Commission's actions did not encompass other wireline broadband services, such as stand-alone Asynchronous Transfer Mode service (ATM), Frame Relay service, Gigabit Ethernet service, and other high-capacity special access services.[49] The Commission stated that carriers and end users traditionally have used these services for basic transmission purposes and that these services, unlike wireline broadband Internet access services, are telecommunications services under the statutory definitions and thus subject to Title II.[50]

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[44] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15859-61, paras. 7-9 (2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-303, paras. 9-19 (2004).

[45] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Broadband 271 Forbearance Order*), *aff'd sub nom. EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (*EarthLink v. FCC*).

[46] 47 U.S.C. § 157 nt.

[47] *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14872-915, paras. 32-111.

[48] *Id.* at 14860, n.15.

[49] *Id.*

[50] *Id.*; *see* 47 U.S.C. § 153(43), (46). We note that issues relating to this framework are pending before the Commission in a number of proceedings. *See*, *e.g.*, *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (examining the regulatory framework to apply to price cap LECs' interstate special access services, including whether to maintain or modify the Commission's pricing flexibility rules); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, FCC 07-123 (rel. July 9, 2007); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband NPRM*) (examining what regulatory safeguards under Title II of the Act, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband services); *Computer III Further Remand Proceedings: Bell Operating Company Provision of* (continued….)

17. On December 20, 2004, Verizon filed a petition requesting that the Commission forbear from applying Title II common carrier requirements or *Computer Inquiry* rules to Verizon's broadband services.[51] On December 19, 2005, the Commission, pursuant to section 10(c) of the Act, extended by 90 days (until March 19, 2006) the date by which Verizon's petition would be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act.[52] By their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon's petition in part. Section 10(c) provides that a forbearance petition "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one year period is extended by the Commission."[53] On March 20, 2006, the Commission issued a News Release announcing that the petition had been granted by operation of law.[54] At that same time, the Chairman and Commissioners issued statements expressing their views on the deemed grant of Verizon's forbearance petition.[55]

IV. DISCUSSION

18. We grant in part and deny in part ACS's petition. In particular, we forbear from applying the dominant carrier rate-of-return, tariffing, discontinuance, and transfer of control regulations for interstate switched access services provided that ACS complies with certain conditions, specified below. We also grant forbearance relief for mass market broadband Internet access transmission services subject to the conditions specified below. We deny ACS's Petition to the extent it seeks forbearance from dominant carrier regulation of special access services. We also grant in part and deny in part ACS's request for forbearance from Title II and *Computer Inquiry* requirements for certain enterprise broadband services subject to certain conditions. In all other respects, ACS's Petition is denied.

(Continued from previous page)
Enhanced Services, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6046, para. 6 (1998) (inviting comment on whether the Commission should eliminate the open network architecture, comparably efficient interconnection, and other *Computer III* requirements).

[51] *See* Verizon Forbearance Petition at 24. Subsequently, Verizon clarified the scope of forbearance relief that remained pending in light of the relief already granted in the *Wireline Broadband Internet Access Services Order*. *See* Verizon WC Docket No. 04-440 Feb. 17, 2006 *Ex Parte* Letter; Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter, Attach. 1.

[52] 47 U.S.C. § 160(c); *Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (WCB 2005).

[53] 47 U.S.C. § 160(c).

[54] Verizon-Related News Release, *supra* note 4.

[55] Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (rel. Mar. 20, 2006) (Verizon WC Docket No. 04-440 Martin/Tate Statement); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition, Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (rel. Mar. 20, 2006) (Verizon WC Docket No. 04-440 Copps Statement); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (rel. Mar. 20, 2006) (Verizon WC Docket No. 04-440 Adelstein Statement).

A. Forbearance Standard

19. The Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[56] In making such determinations, the Commission also must consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[57]

B. Scope of ACS's Petition

20. As in prior orders, we focus our forbearance analysis on the specific services and legal requirements from which ACS seeks forbearance.[58] Thus, we begin by identifying the specific relief ACS requests in its petition, including the statutory provisions and the Commission regulations. First, with respect to its interstate switched access services and special access services generally, ACS seeks forbearance from dominant carrier regulations for all of the switched and special access services it offers in the Anchorage study area, and appends a list of those regulations and a summary of those rules.[59] The Petition states that ACS is not seeking a declaratory ruling that it is nondominant. With respect to mass market broadband Internet access transmission services, ACS further states that it seeks to offer residential digital subscriber line (DSL) transmission service on a non-common carrier basis.[60]

21. Second, ACS seeks relief "consistent with that granted to Verizon Telephone Companies on March 19, 2006," for "broadband services."[61] Specifically, ACS seeks relief from regulation as a common carrier or telecommunications service provider for any packetized broadband services it offers or may offer in Anchorage.[62] ACS seeks the ability to offer all these services on a non-common carrier

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[56] 47 U.S.C. § 160(a).

[57] *Id*. § 160(b).

[58] *Qwest Omaha Order,* 20 FCC Rcd at 19423, para. 14; *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5214, para. 11 (2007) (*Qwest Section 272 Sunset Forbearance Order*).

[59] ACS Petition at 3, App. A. ACS's Petition states that ACS would continue to be classified as an incumbent LEC in the Anchorage market. ACS further states it is not seeking a declaratory ruling that it is nondominant, but, by virtue of its requested forbearance, ACS nonetheless generally would be subject to the same regulatory treatment as nondominant carriers. ACS Petition at 3-4, App. A at 1. ACS provides two specific examples of the nondominant treatment to which it would be subject: (1) ACS "would accept" a ceiling on terminating interstate switched access rates similar to the ceiling the Commission imposed on Qwest in the *Qwest Omaha Order* under section 61.26 of the Commission's rules; and (2) like Qwest, ACS would be subject to nondominant carrier regulation of service discontinuance and transfer of control. ACS Petition at 4; *Qwest Omaha Order*, 20 FCC Rcd at 19434-36, paras. 39-41, 43.

[60] ACS June 29, 2007 *Ex Parte* Letter at 6 n.17.

[61] *See* ACS Petition at 6-7; ACS June 29, 2007 *Ex Parte* Letter at 7-8 & Exh. A at 5; *see also* Letter from Karen Brinkmann and Elizabeth R. Park, Counsel for ACS Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 4-6 & Exh. C (revising Exhibit C to ACS's June 29, 2007 *Ex Parte* Letter) (filed July 25, 2007) (ACS July 25, 2007 *Ex Parte* Letter). For convenience, we refer to these as "enterprise broadband services."

[62] ACS June 29, 2007 *Ex Parte* Letter at 7.

basis.[63] ACS also seeks forbearance from "the same regulation from which forbearance was sought and granted in the original Verizon petition."[64] ACS does not seek relief from universal service contribution obligations "to the extent [it] offers broadband services that remain subject to the obligation to contribute to universal service as 'telecommunications.'"[65]

22. ACS claims that the services for which it seeks relief fall within the same two categories of services as those for which Verizon sought relief: (1) packet-switched services capable of transmitting at speeds of at least 200 kilobits per second (kbps) in both directions; and (2) non-time division multiplexing-based (non-TDM-based) optical networking, optical hubbing, and optical transmission services having the same transmission speed capabilities.[66] ACS states that it presently offers the following services within these categories on an interstate basis: Transparent Local Area Network (LAN) Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services.[67] ACS also states that it may offer in the future the following additional broadband telecommunications services on an interstate basis: Frame Relay Services, ATM Service, Optical Networking Service, Wavelength-Based Transport Service, and Remote Network Access Service.[68] ACS's broadband forbearance request encompasses these enumerated existing and planned services as well as any other broadband telecommunication services that ACS might offer in the future in Anchorage.[69]

C. Sufficiency of ACS's Petition

23. Before we examine the merits of ACS's Petition, we address certain procedural objections. Certain commenters in this proceeding ask the Commission to dismiss or deny the petition for lack of the

[63] *Id.* at 2 n.2, 7; ACS July 25, 2007 *Ex Parte* Letter at 4-6.

[64] ACS Petition at 6. Although we do not address in this order the scope of the relief granted Verizon through operation of law, we construe this part of ACS's petition as requesting relief from the *Computer Inquiry* obligations that apply to ACS in connection with any broadband information service it may provide in Anchorage. *Cf.* Verizon Forbearance Petition at 1, 20-23 (seeking relief from the application of *Computer Inquiry* obligations with regard to Verizon's broadband services).

[65] *See* ACS Petition at 7.

[66] *See id.*; ACS June 29, 2007 *Ex Parte* Letter at 7; ACS July 25, 2007 *Ex Parte* Letter at 4-5 (stating that ACS does not seek "enterprise broadband services" forbearance with respect to "traditional TDM-based special access services used to service business customers, such as DS1 and DS3 special access circuits").

[67] ACS June 29, 2007 *Ex Parte* Letter at Exh. C, *as revised*, ACS July 25, 2007 *Ex Parte* Letter at Exh. C; ACS Tariff FCC No. 1, §§ 7.6, 7.10, 7.11. Although ACS's list of its broadband services offerings also includes "Optical Transport Service," ACS July 25, 2007 *Ex Parte* Letter, Exh. C at 2, these services appears to consist of Shared Sonet Ring Interoffice Transport Services offered at speeds of less than 200 kbps. *See* ACS Tariff FCC No. 1, § 16.4.5. These services therefore fall outside of the scope of ACS's petition, which seeks broadband relief only for "packetized offerings of at least 200 kbps in each direction." ACS July 25, 2007 *Ex Parte* Letter at 4.

[68] *See* ACS June 29, 2007 *Ex Parte* Letter at Exh. C, *as revised*, ACS July 25, 2007 *Ex Parte* Letter at Exh. C.

[69] *See*, *e.g.*, ACS July 25, 2007 *Ex Parte* Letter at 6 (stating that ACS seeks forbearance with respect to broadband services meeting the definition above "whether offered by ACS now or in the future" and that ACS has listed particular services it may offer in the future "only as examples of types of services for which ACS is seeking forbearance").

specificity in the relief requested that is necessary to provide commenters with proper notice and allow the Commission to undertake the required section 10 analysis.[70]

24. We decline to reject any aspect of ACS's Petition on the grounds of ambiguity or insufficiency of pleading. No party disputes that ACS's request for forbearance includes certain services, such as mass market switched access services. Rather, the parties' concerns focus primarily on ACS's special access services. As discussed below, we deny ACS's request for forbearance from dominant carrier regulation of its special access services generally, and thus we need not reach the issue of whether the Petition should be denied for lack of clarity.[71] We also reject the criticism of the petition's forbearance request with respect to enterprise broadband services based on the fact that the precise scope of forbearance deemed granted to Verizon was subject to disagreement.[72] Rather than counseling in favor of denying the petition for lack of clarity, we find that setting forth our analysis below will help clarify the Commission's approach to this issue, although the ultimate outcome is based on the specific facts of the record here.

D. Requested Forbearance Relief Similar to *Qwest Omaha Order*

25. ACS requests conditional forbearance from dominant carrier regulation of its interstate switched and special access services, and contends that such relief would be consistent with the *Qwest Omaha Order*.[73] To the extent that ACS seeks relief for mass market switched access services and mass market broadband Internet access transmission services, its request falls within the same category of services for which relief was granted to Qwest. ACS also requests forbearance relief for enterprise switched access services and special access services, and thus seeks forbearance relief that goes beyond that granted in the *Qwest Omaha Order*. For the reasons explained below, the evidence in this proceeding enables us, consistent with the criteria of section 10, to grant ACS the conditional forbearance relief it seeks for both mass market and enterprise switched access and end-user services. We otherwise deny ACS's request for forbearance relief similar to that granted in the *Qwest Omaha Order*.[74]

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[70] *See* GCI Motion to Dismiss at 1; Time Warner Telecom Comments at 2. Other commenters endorse GCI and Time Warner Telecom's positions regarding the lack of clarity. *See*, *e.g.*, Sprint Nextel Reply at 1-2 (sharing the concerns of GCI and Time Warner Telecom that the scope of forbearance sought in the Petition is unclear); Broadview Reply at 2 n.5 (concurring in the arguments of GCI and Time Warner Telecom that ACS has not defined the relief it seeks with sufficient precision).

[71] For the reasons described above, we deny GCI's Motion to Dismiss. We therefore do not reach the question of whether a petitioner's subsequent submissions can enlarge the scope of its initial section 10 forbearance petition. We note, however, that, although a forbearance petitioner of course may clarify or narrow the scope of a forbearance request through subsequent submissions, it would raise difficult questions if a forbearance petitioner's subsequent submissions could enlarge the scope of its initial section 10 forbearance petition to include whole categories of additional services like special access if they were not encompassed in its initial petition. *See*, *e.g.*, ACS May 24, 2007 *Ex Parte* Letter at 2 ("The Petition unambiguously seeks relief as to the Anchorage market"); ACS Reply at 14 (identifying special access services as part of ACS's request for relief); ACS June 29, 2007 *Ex Parte* Letter at 4, 8.

[72] GCI Motion to Dismiss at 4 (citing ACS Petition, App. A at 5; Verizon WC Docket No. 04-440 Martin/Tate Statement; Verizon WC Docket No. 04-440 Copps Statement; Verizon WC Docket No. 04-440 Adelstein Statement); *see also* Time Warner Telecom Comments at 2.

[73] *See* ACS Petition at 3-4; ACS Reply at 13-14; ACS June 29, 2007 *Ex Parte* at 3.

[74] We address separately ACS's request for forbearance relief for enterprise broadband services comparable to what Verizon was granted by operation of law. *See infra* Part IV.E.

26. ACS states that it does not seek a declaratory ruling that it is nondominant.[75] Nevertheless, we recognize the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers through dominant carrier regulations.[76] Specifically, section 10(a)'s mandate to forbear for a "telecommunications service, or class of . . . telecommunications service" in any or some of a carrier's "geographic markets"[77] closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. Accordingly, as we evaluate the dominant carrier regulations at issue pursuant to the section 10 standard below, our inquiry is informed by the Commission's traditional market power analysis.[78]

1. Threshold Market Analysis

a. Services for Which Forbearance Is Requested

27. ACS proposes that we focus our analysis on the services that the Commission identified in the *Qwest Omaha Order* –mass market and enterprise market services, with mass market services subdivided into interstate exchange access services and broadband Internet access transmission services.[79] As discussed in greater detail below, for the purposes of this proceeding, and consistent with the *Qwest Omaha Order* framework,[80] we separately consider: (1) mass market switched access services; (2) mass market broadband Internet access transmission services; (3) enterprise switched access services; and (4) special access services.

28. *Mass Market*. For the purposes of evaluating Qwest's request for relief from dominant carrier regulation in the *Qwest Omaha Order*, the Commission separately analyzed mass market switched access services and mass market broadband Internet access transmission services.[81] No party challenges the reliance on this precedent, and we adopt the same approach for the instant proceeding.[82] For the reasons given in the *SBC/AT&T Order* and *Verizon/MCI Order*, we reject ACS's suggestion that we

[75] *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at 3 (stating that ACS has not requested a finding that it is nondominant).

[76] We are mindful that, when determining whether a carrier has market power in conducting a dominance analysis, the Commission must not limit itself to market share, but instead must look to all four factors that the Commission traditionally considers, or explain its departure from this traditional analysis. *See AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001). Because we do not undertake a stand-alone market power inquiry in this proceeding, this four-factor test does not bind our section 10 forbearance analysis. *See Qwest Omaha Order*, 20 FCC Rcd at 19425, para. 17 n.52. We therefore reject commenters' arguments to the contrary. *See* Time Warner Telecom Comments at 6.

[77] 47 U.S.C. § 160(a).

[78] *See Qwest Omaha Order*, 20 FCC Rcd at 19425, para. 17 n.52.

[79] ACS Petition at 20-21; *Qwest Omaha Order,* 20 FCC Rcd at 19426-28, paras. 20-22.

[80] We also separately identify and analyze enterprise broadband services for purposes of our analysis of ACS's request for forbearance comparable to what Verizon was granted by operation of law.

[81] *Qwest Omaha Order*, 20 FCC Rcd at 19427-28, para. 22.

[82] Unlike prior market power decisions, which included local exchange service and exchange access services in the same product market, here we only examine exchange access services because section 10(a) focuses our inquiry on the target services to which our regulations apply, consistent with the Commission's approach in the *Qwest Omaha Order*. *Id.* at 19427, para. 22 n.64.

should include e-mail and instant messaging in our analysis of mass market services.[83] We also decline to include facilities-based voice over Internet Protocol (VoIP) service and wireless service as close substitute products in our analysis, since there is no data in the record that justifies including such services in our analysis. Accordingly, we will separately consider mass market switched access services and mass market broadband Internet access transmission services.

29. *Enterprise Market*. In the *Qwest Omaha Order*, the Commission explained that, because the record in that proceeding did not generally provide a more granular break-down between small and large businesses or other categories, the Commission did not attempt to analyze enterprise services at a more disaggregated level.[84] In addition, because the Commission found insufficient basis in the record to grant forbearance from dominant carrier regulation of enterprise services, it found that a more granular breakdown was unnecessary. In more recent orders, the Commission has separately analyzed retail enterprise services and special access services.[85] In addition, we note that commenters argue that there are additional distinct categories of retail and wholesale enterprise services in Anchorage.[86]

30. As an initial matter, consistent with our precedent and the record in this proceeding, we separately analyze enterprise switched and special access services for three reasons. First, the evidence in the record suggests that enterprise customers do not view switched access services and special access services as close substitutes.[87] Second, certain of the regulations from which ACS seeks forbearance distinguish between switched and special access services.[88] Third, ACS has proposed different conditions for enterprise switched access services and special access services. The qualified and limited nature of these distinct proposed conditions necessitates distinct evaluation of these services. Separately analyzing enterprise switched access services and special access services also addresses GCI's specific concern that

[83] ACS Petition at 22; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18342, para. 91 n.282 (2005) (*SBC/AT&T Order*); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18484, para. 92 n.282 (2005) (*Verizon/MCI Order*).

[84] *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50.

[85] *See*, *e.g.*, *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5678, 5697-98, paras. 28, 63-64 (2007) (*AT&T/BellSouth Order*) (separately analyzing special access services and other enterprise services).

[86] *See*, *e.g.*, GCI Comments at 7 (identifying residential service, small business service, and medium and large business telecommunications service as separate retail product markets); *id*. at 11 (arguing that carrier-to-carrier switched access services should be separated from carrier-to-carrier special access services). Although we disaggregate on the basis of service categories here, we reserve the right to grant or deny a section 10 forbearance petition in its entirety based on analysis of an entire class of services as pled. *See Qwest Omaha Order*, 20 FCC Rcd at 19445, para. 61 n.161 ("We are under no statutory obligation to evaluate Qwest's Petition other than as pled . . . .").

[87] For example, GCI contends that from the perspective of a retail customer, switched services and special access services are not fully substitutable. GCI Comments at 7. In addition, participants in this proceeding submitted market share data distinguishing between switched and special access services. ACS May 24, 2007 *Ex Parte* Letter, Attach. at 1-2.

[88] *See generally* 47 C.F.R. § Part 69, Subparts C and D (setting forth a separate special access category to which investments and expenses of providing special access are allocated).

it would be inappropriate to treat the enterprise market as a whole.[89]

31. Consistent with Commission precedent, we separately analyze retail special access services and wholesale special access services.[90] The arguments raised in the record, the data presented by GCI, and the particular characteristics of the Anchorage study area all argue for such a separate analysis. Furthermore, because special access services serve as such an important input for other carriers' provision of retail enterprise services,[91] we believe it is appropriate to analyze separately the extent of competition for wholesale special access services, since the requested relief would implicate wholesale special access services.[92]

b. Geographic Scope of Analysis

32. ACS seeks forbearance in the area coextensive with the ACS Anchorage incumbent LEC study area.[93] ACS submits that consumers throughout the Anchorage study area have access to the same choices of service at the same retail rates.[94] In the *Qwest Omaha Order*, the Commission explained that it began its forbearance analysis of dominant carrier regulation with the proposed area of relief as the relevant geographic market, unless the record indicated compelling reasons to narrow it.[95]

33. We note that no commenter opposes the use of the Anchorage study area for purposes of evaluating mass market switched access and broadband services. In addition, such an approach is consistent with that taken by the Commission in the *Qwest Omaha Order*, where the Omaha MSA was used for purposes of analyzing mass market switched access and broadband services.[96]

34. With respect to enterprise switched access services, we reject commenters' contention that the Anchorage study area is overbroad for purposes of analyzing enterprise services.[97] GCI notes that pricing in the business market is customer-specific, and asserts that, if the Commission were to forbear from ACS's obligation to offer section 251 UNEs, different business customers would face different competitive alternatives depending upon the availability of GCI's facilities.[98] Although the Commission

[89] GCI Comments at 7-8.

[90] *See*, *e.g.*, *AT&T/BellSouth Order*, 22 FCC Rcd at 5676, para. 27 (defining wholesale special access services as a product market); *Verizon/MCI Order*, 20 FCC Rcd at 18447, para. 24 (same).

[91] *See*, *e.g.*, *AT&T/BellSouth Order*, 22 FCC Rcd at 5676-77, para. 27 (stating that entities "needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider"). *See also* Letter from John T. Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 5 (filed Aug. 10, 2007) (GCI Aug. 10, 2007 *Ex Parte* Letter) (explaining that GCI's ability to compete for enterprise customers "is largely dependent on its continued access to the underlying UNE and/or special access facilities").

[92] We note that ACS also separately seeks different, additional forbearance relief for a subset of its special access services. We analyze that distinct request for relief below. *See infra* para. 94.

[93] ACS Petition at 13.

[94] *Id*.

[95] *Qwest Omaha Order,* 20 FCC Rcd at 19428, para. 24.

[96] *Id.*

[97] *See* GCI Comments at 9; Broadview Reply at 6.

[98] GCI Comments at 9.

ultimately granted ACS forbearance from section 251 unbundling obligations in certain wire centers in the *ACS UNE Order*, it targeted that relief to those wire centers where GCI had extensive facilities deployed.[99] Thus, we do not anticipate that mass market or enterprise switched access customers will face different competitive choices throughout the Anchorage study area by virtue of the forbearance from section 251 unbundling. Likewise, ACS's commitment to offer residential and enterprise switched access services, under terms, conditions, and prices mutually agreed upon between ACS and GCI, is uniform throughout the Anchorage study area.[100]

35. With regard to special access services, we believe for several reasons that it is necessary to perform our analysis on a more disaggregated geographic basis.[101] First, the Commission has traditionally adopted a building-specific approach to analyzing competition in special access services.[102] Second, the evidence in the record indicates that the availability of competitive facilities varies from building to building.[103] Third, the evidence indicates that prices for enterprise customers are set on a customer-specific basis. Accordingly, we reject ACS's suggestion that defining the relevant geographic market as less than the entire study area would be inappropriate.[104]

c. Marketplace Competitors

36. *Mass Market Switched Access Services*. The record indicates that ACS faces strong competition from GCI for the provision of mass market switched access. GCI first entered the Anchorage service area in 1997, and is in the midst of a multi-phase process of upgrading its cable facilities to

[99] We also note that the forbearance was conditioned on ACS's continued offering of certain loop and subloop access alternatives. *See ACS UNE Order*, 22 FCC Rcd at 1983-85, para. 39.

[100] ACS May 24, 2007 *Ex Parte* Letter, Exh. Interconnection Agreement at 40. We recognize that the Commission used wire centers as the geographic areas of focus in its analysis of whether granting ACS forbearance from unbundling obligations was warranted under section 10. *See ACS UNE Order*, 22 FCC Rcd at 1967-69, paras. 14-16. As the Commission held in the *Qwest Omaha Order*, when determining whether to grant forbearance from unbundling obligations, that inquiry is informed by our unbundling precedent, rather than our dominant carrier precedent. *See Qwest Omaha Order*, 20 FCC Rcd at 19438-39, para. 50 n.129. The Commission's relevant high-capacity loop and transport UNE obligations are determined on a wire center basis. *See*, *e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2581-85, paras. 79-85 (analyzing dedicated transport impairment at the "very detailed level" of specific routes between wire centers); *see also id*. at 2619-25, paras. 155-65 (conducting a wire center-based impairment analysis for high-capacity loops). In contrast, the Commission's approach when evaluating forbearance from dominant carrier regulations is independent of the framework used in the Commission's unbundling precedent. For the reasons described above, we do not evaluate data on the wire center basis for purposes of that distinct analysis.

[101] These findings apply to our analysis here of special access services as a whole. The evidence persuades us that a different approach is warranted for the narrow subset of special access services addressed under ACS's additional forbearance request below. *See infra* para. 94.

[102] *See AT&T/BellSouth Order*, 22 FCC Rcd at 5678, para. 31; *SBC/AT&T Order,* 20 FCC Rcd at 18307, para. 28; *Verizon/MCI Order,* 20 FCC Rcd at 18449, para. 28.

[103] GCI Comments at 9-13 (stating that defining a broader geographic market for special access would be inappropriate because UNEs often are not available as a substitute for such services).

[104] ACS Petition at 19. We recognize that in other contexts such as rulemaking proceedings it could be entirely appropriate for the Commission to rely on information regarding broader geographic areas, based on administrability concerns or other factors.

transition customers from UNEs to its own facilities for voice services.[105] Other traditional wireline competitors in the Anchorage study area include AT&T Alascom.[106] AT&T Alascom competes in the mass market solely using resold services obtained from ACS.[107] Although the Commission, in previous orders, has identified facilities-based VoIP providers and wireless carriers as market participants, there are no data in the record that justifies our including such providers in our analysis.[108]

37. *Mass Market Broadband Service*. We find that ACS is subject to significant intermodal broadband competition in the Anchorage study area. Most notably, GCI, which offers cable modem service to virtually all mass market customers in Anchorage, is the largest provider of mass market broadband services in the Anchorage market.[109] In addition, ACS claims that AT&T Alascom, Clearwire, and TelAlaska are entering this market by offering broadband services over wireless facilities.[110] Although we recognize that providers of wireless broadband services operate in the Anchorage study area, we are unable to make more detailed findings regarding these competitors due to a lack of record evidence indicating the extent and geographic scope of the services they offer.

38. *Enterprise Switched and Special Access Services*. We also find that ACS is subject to significant competition from GCI for enterprise switched access services, but lack record evidence regarding the extent to which GCI or other competitors provide special access service, particularly those that do not rely on ACS's tariffed special access offerings. GCI initially entered the Anchorage market as a long-distance carrier and competitive access provider.[111] In 1998, GCI completed the construction of its fiber optic network, which is concentrated in the Anchorage midtown and downtown areas.[112] GCI has been able to use its network facilities to provide competitive enterprise switched access offerings. Although we recognize GCI as an established competitor in the market for some types of enterprise services, we lack evidence to make any specific findings regarding the extent of GCI's role as a competitive provider of special access services. Although ACS claims that Dobson Cellular and Alaska

[105] GCI Comments, Declaration of Gina Borland (GCI Borland Decl.) Exh. B at 6, 12. GCI's cable plant footprint covers most, but not all, of the ACS Anchorage study area.

[106] ACS Petition at 21.

[107] *See* GCI Borland Decl. at 3; ACS Petition at 17-18.

[108] *See supra* para. 28.

[109] ACS also contends that Eyecom provides cable service in outlying areas of the Anchorage study area where GCI's broadband cable modem service is not available today, and that there is no reason to believe that Eyecom could not offer broadband service. ACS Petition at 26. We find that ACS does not appear to be subject to significant competition for broadband services from Eyecom, given ACS's admission that Eyecom does not currently offer broadband services and the lack of any record evidence that Eyecom is planning in the near future to provide such services.

[110] ACS Petition at 26, 31.

[111] *Id.* at 14 (stating that GCI deployed "urban and long-haul fiber optic cable to serve the Anchorage enterprise market").

[112] GCI Comments, Declaration of Blaine Brown (GCI Brown Decl.) Exh. F at 2; *ACS UNE Order*, 22 FCC Rcd at 1981, para. 36 ("GCI also has deployed a fiber optic network which gives GCI additional capabilities to serve a significant number of additional end user locations in the Anchorage study area with high-capacity or more complex telecommunications services.").

DigiTel provide wireless enterprise switched access services in Anchorage,[113] there are no data in the record that justify our including these providers, or any other providers, in our analysis.[114]

2. Market Analysis

a. Mass Market Switched Access Services

39. *Market Share*. As the Commission observed in the *ACS UNE Order*, retail competition in the Anchorage study area is robust.[115] In its petition, ACS asserts generally that "GCI alone already has won approximately half of the overall exchange access market."[116] To calculate market shares, we make more specific determinations and find that ACS has **[REDACTED]** residential access lines for no more than a **[REDACTED]** percent share of the switched access mass market, compared to **[REDACTED]** residential access lines for GCI.[117] Consistent with the *Qwest Omaha Order*, we find that the data ACS and GCI have submitted regarding residential customers are a reasonable proxy for the number of mass market switched access customers served by each carrier.[118]

40. *Other Factors*. In assessing demand elasticities for mass market exchange access services, we recognize here as we did in the *CLEC Access Charge Reform Order* that competitive carriers serve two distinct customer groups – end users for long distance calls, and interexchange carriers.[119] With regard to the end user market, we find the demand elasticity in the interstate exchange access mass market

[113] ACS Petition at 24.

[114] *See infra* note 243 (stating that the record is virtually silent regarding the extent to which AT&T Alascom has deployed its own special access facilities).

[115] *ACS UNE Order*, 22 FCC Rcd at 1975, para. 28; *see also* GCI Comments at 6.

[116] ACS Petition at 21-22.

[117] *See* ACS June 29, 2007 *Ex Parte* Letter at Exh. D (detailing line numbers as of April 30, 2007); Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at Exh. V (filed July 12, 2007) (GCI July 12, 2007 *Ex Parte* Letter) (detailing residential switched voice lines as of September 2006). Although GCI includes "ACS UNE-L" in its provisioning methods as of September 2006, the Commission has forborne from requiring ACS to unbundle loops in five of the 11 wire centers in the Anchorage study area. We expect that these lines are now provisioned pursuant to the commercially negotiated arrangement ACS and GCI reached, and so continue to count these lines as part of GCI's market share. Since no carriers other than ACS and GCI provided switched access data on our record, we are unable to calculate market share figures precisely. *See* GCI Borland Decl. at 3 (stating that AT&T Alascom competes in the residential mass market solely using resold services obtained from ACS, and that although TelAlaska offered service in the Anchorage business market for a brief period, recent inactivity suggests it may no longer do so).

[118] *Qwest Omaha Order*, 20 FCC Rcd at 19430, para. 28 n.78. As the Commission explained in the *Qwest Omaha Order* in a similar situation, because the parties submitted their customer data grouped in categories of "residential" customers and "business" customers, and because the economic considerations that lead to the provision of service to a residential customer are similar to the economic considerations that lead to the provision of service to a very small business customer, we find it reasonable to treat the data ACS and GCI have submitted regarding residential customers as a proxy for the number of mass market customers served by each carrier. *See id*.; ACA Petition at 29-30 n.120 ("ACS believes the residential customer information it submits is a reasonable proxy for the mass market.").

[119] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938, para. 38 (2001) (*CLEC Access Charge Reform Order*).

to be high. The Commission has repeatedly found that residential customers are highly demand-elastic and willing to switch to or from their provider to obtain price reductions and desired features.[120] Nothing in this record indicates otherwise for mass market customers in Anchorage, and the growth in GCI's residential access line base and corresponding decline in ACS's base support our forbearance determination here. Furthermore, consumers in Anchorage will have the added protection of a cap on their end-user SLCs, which we adopt as a condition of the forbearance we grant ACS. Separately, with regard to the exchange access services ACS provides interexchange carriers, we previously have identified concerns stemming from the terminating access monopoly and interexchange carriers' inability to switch exchange access providers.[121] Thus, as further explained below, to address these concerns, we also adopt certain conditions, including a cap on switched access rates, that will help ensure that our forbearance does not result in rates that are unjust or unreasonable.

41. With respect to supply substitutability, we find that GCI has extensive and modern facilities throughout much of Anchorage, and that its network has sufficient capacity such that GCI could easily expand the number of customers it serves. In addition, network elements unbundled pursuant to section 251(c)(3) remain available in much of Anchorage.[122] Accordingly, we find that there is adequate supply elasticity in this market for competitors to respond to any price increase ACS might attempt.

42. *Firm Cost, Size, Resources*. The record reveals that ACS's most significant competitor in the Anchorage study area is GCI.[123] There is no record evidence to indicate that ACS possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities as compared to GCI. GCI is a large business that can provide a suite of mass market switched access services that are reasonably comparable to services provided by ACS.[124]

b. Enterprise Switched Access Services

43. *Market Share*. With regard to market share for these services, we find compelling that GCI has acquired **[REDACTED]** business switched voice lines in the Anchorage study area, compared to the **[REDACTED]** business retail access lines that ACS has retained.[125] As with our mass market switched access analysis, we are unable to calculate market shares precisely, given the lack of data regarding other

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[120] *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3305, para. 63 (1995) (*AT&T Reclassification Order*).

[121] *See Qwest Omaha Order*, 20 FCC Rcd at 19432, para. 33; *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9926-27, paras. 10-11.

[122] We note that although GCI is now migrating its customers to its own last-mile facilities, GCI relied on UNEs as a way to enter the local exchange marketplace. *See* GCI Comments at 22 (noting that competition in the Anchorage study area "exists largely due to UNEs"); *see also ACS UNE Order*, 22 FCC Rcd at 1980, para. 36 n.117 (discussing GCI's migration of customers from ACS's facilities to GCI's facilities). We also note that in wire centers where UNEs are not available, ACS remains obligated under the *ACS UNE Order* to make available access to certain loops and subloops.

[123] ACS Petition at 14-15.

[124] *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* at 11; *ACS UNE Order*, 22 FCC Rcd at 1981-82, para. 36.

[125] *See* ACS June 29, 2007 *Ex Parte* Letter at Exh. D (detailing line numbers as of April 30, 2007); GCI July 12, 2007 *Ex Parte* Letter at Exh. V (detailing voice lines as of September 2006 based on the average number of switched voice lines per UNE or wholesale T1 leased from ACS). All figures are based on DS0 voice-grade equivalents.

carriers. Thus, considering just the data for GCI and ACS indicates an approximate **[REDACTED]** market share for ACS. We find that even this estimated market share suggests that there exists substantial competition for enterprise switched access services.[126]

44. *Other Factors*. As with mass market switched access services, the record in this proceeding does not include data sufficient for us to estimate precisely the own-price elasticity of demand for the relevant services. However, similar to our finding above regarding the mass market, the evidence in the record is consistent with a finding that enterprise switched access customers are highly sensitive to changes in the price of switched access telecommunications services.[127] Furthermore, as a condition of the forbearance we grant ACS, enterprise customers will have the added protection of a cap on their end-user SLC charges.

45. Also similar to the evidence for mass market customers, with respect to supply substitutability, the record of competition in this proceeding and the other market-opening regulations that remain in place support the finding that supply elasticity is high. With respect to business customers, as with mass market customers, GCI has the ability to serve customers over its own facilities in many instances.[128] Moreover, in those areas of the Anchorage study area where GCI has fewer facilities capable of being used to provide exchange access services, network elements unbundled pursuant to section 251(c)(3) remain available.[129]

46. *Firm Cost, Size, Resources*. As compared to GCI in relation to the provision of interstate enterprise switched access services, as explained above, there is no record evidence to indicate that ACS possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities than GCI as relevant here.

c. Mass Market Broadband Internet Access Transmission Services

47. *Market Share*. We evaluate ACS's request for forbearance for its DSL transmission service consistent with the Commission's findings in the *Wireline Broadband Internet Access Services Order*. In that order, the Commission found that the market for broadband Internet access services is "an emerging market" and that broadband providers would continue to be subject to actual and potential competition by intermodal and intramodal competitors.[130] The Commission further found that "snapshot data . . . may quickly and predictably be rendered obsolete as this market continues to evolve."[131] Although our

[126] Particularly in light of the Anchorage enterprise market, where there is modest demand for high capacity services, and the fact that that the switched access services supplied to enterprise customers are relatively homogenous, we do not draw distinctions among the enterprise customers with respect to their purchase of switched access services. *See*, *e.g.*, *ACS UNE Order*, 22 FCC Rcd at 1981, para. 36.

[127] For example, ACS states that 525 local exchange customers switched to GCI in a single day following an ACS price increase. ACS Petition at 32. *See also Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5228, para. 38.

[128] *ACS UNE Order*, 22 FCC Rcd at 1979-82, paras. 35-36.

[129] *See id.* at 1972, para. 23.

[130] *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50.

[131] *Id. Cf. Application of Worldcom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to Worldcom, Inc*., Memorandum Opinion and Order, 13 FCC Rcd 18025, 18036-37, paras. 17-18 (1998) (*Worldcom/MCI Order*); *cf. also* Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, § 1.521 (Apr. 2, 1992, revised Apr. 8, 1997) (*DOJ/FTC Horizontal Merger Guidelines*) ("Market concentration and market share data of necessity are based on historical evidence. (continued….)

analysis does not rely solely on static market share data, we note that the available information regarding the Anchorage market is consistent with the Commission's general conclusions in the *Wireline Broadband Internet Access Services Order*. No party disputes ACS's assertion that GCI is the largest provider of mass market broadband services in Anchorage, and GCI recognizes the significant role that it plays in the retail market generally.[132] ACS submits estimated data that GCI has an even greater share of the mass market for broadband Internet access services than for switched access. In particular, ACS estimates that GCI has a market share of **[REDACTED]** percent of this market.[133] ACS admits that broadband subscriber data for the Anchorage market is not readily available and has not supported its methodology in making this estimate. Therefore, although we are unable on this record to determine any specific percentage, we note that GCI has not challenged this estimate.[134] Moreover, the factual conclusions in the *ACS UNE Order* likewise indicate that GCI is the leading provider of broadband Internet access services.[135]

48. *Other Factors*. We find that demand substitutability and elasticity for mass market broadband Internet access services also are high. The record here is consistent with the Commission's findings in recent decisions that customers have the ability and willingness to choose between competing DSL and cable modem services.[136] In terms of supply elasticity, we find that GCI's entry over the last several years into the broadband market and its current market position indicate that GCI is capable of quickly serving additional customers should ACS attempt to raise the price of its wireline broadband Internet access services. Indeed, as the Commission found in the *ACS UNE Order*, GCI has "market leading broadband facilities."[137]

49. *Firm Cost, Size, Resources*. As compared to GCI in relation to the provision of mass market broadband Internet access transmission services, there is no record evidence to indicate that ACS

(Continued from previous page)
However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.").

[132] *See* GCI Comments at 6 ("There is no question that the Anchorage market is currently highly competitive with respect to *retail* services.").

[133] ACS Petition at 30-31; ACS Petition, Statement of Robert G. Doucette (ACS Doucette Decl.) Exh. A at 2-3 (detailing market share of ACS's "Mass Market Broadband Connections"); ACS Petition, Statement of Howard A. Shelanski (ACS Shelanski Decl.) Exh. C at 4-5. *See also* ACS June 29, 2007 *Ex Parte* Letter at 9-10 & Exh. E (submitting that GCI has a **[REDACTED]** percent market share of the broadband market).

[134] *See* ACS July 25, 2007 *Ex Parte* Letter at 7. ACS explains that its estimate of GCI's market share of the broadband market in the Anchorage study area is based on the assumption that market shares on a statewide basis also reflect the relative market shares in Anchorage. *See id*. We find no support for this assumption in the record, nor for other assumptions ACS makes in attempting to disaggregate residential and business broadband customers.

[135] *ACS UNE Order*, 22 FCC Rcd at 1980, para. 36; *see also id.* at para. 36 n.122 (citing Letter from Karen Brinkman, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Dec. 6, 2006) (showing that GCI has approximately twice as many broadband Internet access services lines in Alaska as ACS); Letter from Brad Mutschelknaus and Thomas Cohen, Counsel for XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, Attach. at 3 (filed Dec. 18, 2006) (stating that GCI dominates the broadband Internet access services market in the Anchorage study area)).

[136] *See Qwest Omaha Order*, 20 FCC Rcd at 19432, para. 34; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21506, para. 22; *Incumbent LEC Broadband NPRM,* 16 FCC Rcd at 22748, para. 5; *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14029, para. 167 (2005).

[137] *ACS UNE Order*, 22 FCC Rcd at 1982, para. 36.

possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities as relevant here.

d. Special Access Services

50. *Market Share*. We are unable to determine on the record before us the market share for ACS or any other carrier for either retail or wholesale special access services in Anchorage. The Commission found in the *ACS UNE Order* that nothing on the record in that proceeding reflected any significant alternative sources of wholesale inputs for carriers in the Anchorage study area,[138] and no evidence in the instant proceeding persuades us to conclude otherwise here.

51. ACS states that it "provides a very small number of special access circuits directly to end-user customers," and explains that it primarily supplies special access circuits as wholesale inputs to other carriers, including ACS's own long distance, Internet access, and wireless affiliates.[139] ACS has submitted data showing that, as of May 2, 2007, it provisioned only **[REDACTED]** voice grade or digital data DS0, **[REDACTED]** DS1, and **[REDACTED]** DS3 special access circuits to retail customers.[140] In contrast, ACS provides **[REDACTED]** voice grade or digital data DS0, **[REDACTED]** DS1, and **[REDACTED]** DS3 special access circuits as wholesale inputs to other carriers, including ACS's long distance, Internet access, and wireless affiliates.[141] We place particular weight on the evidence that other carriers – in particular GCI and AT&T Alascom – appear to rely heavily on ACS for wholesale special access services.[142] For instance, GCI and AT&T Alascom together purchase approximately **[REDACTED]** times as many DS0 special access voice and data circuits, and **[REDACTED]** times as many DS1 and **[REDACTED]** as many DS3 special access circuits, as ACS sells either at retail or at wholesale to its long distance affiliate.[143]

52. In addition, GCI submits that, of the approximately 5000 business locations in Anchorage, it provides telecommunications services to only about **[REDACTED]** locations over its own fiber network,

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[138] *Id*. at 1977, para. 30.

[139] *See* ACS June 29, 2007 *Ex Parte* Letter at 9.

[140] *See id*. at 22.

[141] *See id*. at Exh. D. The data above include the intrastate special access circuits GCI purchases from ACS as well as the special access ACS provides to retail customers. Although the Commission's dominant carrier regulations do not extend to intrastate special access services, those services are relevant to the state of competition for interstate special access services. *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at 9 (stating that ACS is unable to determine whether the intrastate special access circuits GCI orders from ACS are used to provide special access services to end-user customers or for wholesale purposes, but that they most likely are used for interexchange access rather than as a substitute for UNEs). Based on the specific data presented on the record, neither our analyses nor conclusions in this order would be different if intrastate data were excluded.

[142] We also note that CMRS carriers typically depend on wholesale special access services to connect their CMRS networks to the wireline telephone network. ACS has not submitted evidence explaining whether the CMRS carriers in the Anchorage study area rely on special access inputs that do not depend either directly or indirectly on ACS's wholesale special access offerings. *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at Exh. D (stating that ACS provides **[REDACTED]** DS1 special access circuits in the Anchorage study area to CMRS carriers). Relevant to our analysis is that UNEs are not available solely to provide CMRS service. *See* 47 C.F.R. § 51.309(b).

[143] *See* ACS June 29, 2007 *Ex Parte* Letter at Exh. D.

and has placed fiber into approximately **[REDACTED]** other locations.[144] However, nothing that ACS or any other party has submitted on this record allows us to determine the total market for either retail special access or wholesale special access services for any circuit capacity. For example, absent data about the number of DS1 interstate channel terminations that GCI or another carrier self-provisions or sells to third-party carriers, we are unable to calculate ACS's share for such special access services. Although GCI estimates that it has cable plant near only **[REDACTED]** percent of small business locations and **[REDACTED]** percent of medium and large business locations in Anchorage, the data does not identify those specific buildings; does not reveal the capacity demanded at those locations; nor the relative extent to which ACS, GCI, and other providers can meet the demand for capacity for those buildings.[145]

53. *Other Factors*. No party to this proceeding has submitted any data or estimates regarding the price elasticity of demand or the elasticity of supply for enterprise special access services, and the ACS Petition's treatment of these factors aggregates enterprise switched access with wholesale and retail special access issues. ACS cites anecdotal evidence of enterprise customers' willingness to switch to alternative providers offering better prices, and cites the "guaranteed value" terms in enterprise customers' contracts that allow GCI or ACS customers to terminate their contract without penalty if a competitor offers a better price that the current provider is unwilling to match.[146] We find, however, the record before us contrasts with those before the Commission in the *Qwest Section 272 Sunset Forbearance Order* and prior proceedings, where the Commission concluded that large enterprise customers in BOC regions tend to be sophisticated consumers aware of the multitude of choices available to them. Here, the enterprise market appears to include few large enterprise customers.[147] Although ACS cites to three recent competitive requests for proposal issued by large enterprise customers, we are unable to make inferences from those customers about enterprise customers in Anchorage as a whole. Moreover, given the limitations of our other competitive findings with respect to special access services, the mixed

[144] GCI Brown Decl. at 3. We also note that GCI responds that there are only **[REDACTED]** buildings in Anchorage for which GCI provides all of the facilities. GCI Brown Decl. at 8.

[145] GCI Comments at 9-10. GCI goes on to claim that, where its hybrid fiber coaxial plant passes business customers, it does not have the capability of providing DS1 services today. *Id*. Further, GCI asserts that, even when it has fully upgraded its cable plant for telephony, its loop facilities will not reach over a third of business locations in Anchorage. GCI Comments at 24, 28.

[146] ACS Petition at 41-42. We note that although ACS cites the "guaranteed value" contract term as enabling customers to get the best price for services, it is not clear why such terms would not tend to entrench the current provider. This particularly could be possible in the event that the current provider was able to rely on its own facilities to serve a customer and its competitor would need to rely on wholesale inputs, such as special access, from the current provider – inputs for which ACS seeks forbearance from dominant carrier regulation. However, given that we deny the requested forbearance for special access services in any event, we need not resolve this issue here.

[147] *See*, *e.g.*, ACS Doucette Decl. at 2 ("Special access connections greater than DS-1 are not included [in the estimates], but are unlikely to be of sufficient quantity to materially affect the market share figures."); ACS Reply at 20 n.85 ("DS3 loops are not needed in Anchorage"); GCI Brown Decl. at 4 (stating that "[o]nly a very few of the largest businesses in the Anchorage study area have the service demand to justify" the cost of extending fiber and installing equipment necessary to provide DS1 services, and that "[t]he average business in the Anchorage markets has 6.36 lines"). To the extent that there are a few larger, sophisticated enterprise customers in the Anchorage study area that demand more sophisticated enterprise services, we find that our analysis of enterprise broadband services below adequately addresses those customers and services.

record with regard to this issue alone does not persuade us that there is sufficient competition for retail or wholesale enterprise services.[148]

54. The record evidence does not enable us to find that wholesale or retail special access services in the Anchorage study area have high supply elasticity. Although ACS makes a variety of claims about the availability of competitive access networks in Anchorage, as discussed above, we have not been able to estimate special access market shares or the availability of competitive facilities to particular buildings.[149] We also have not been able to determine a reliable estimate of retail enterprise market shares generally. Moreover, it appears that the existing enterprise competition relies to a significant extent on wholesale inputs from ACS, including special access services.[150] Given our conclusions below about the insufficiency of ACS's proposed conditions,[151] we cannot assume the continued availability of such inputs on prices, terms, and conditions to allow competitors to increase their supply in response to attempts by ACS to exercise market power in the event we were to forbear from dominant carrier regulation of ACS's special access services generally.

55. *Firm Cost, Size, Resources*. As explained above, we are unable to determine on the record before us the market share for ACS or any other carrier for either retail or wholesale special access services in the Anchorage study area, which impacts our ability to make findings here, particularly with respect to whether ACS incurs sufficiently lower costs than its competitors regarding the provision of special access services.

3. Forbearance Analysis for Dominant Carrier Regulation

a. Switched Access Services

56. ACS asks "to be regulated under 'the same regime under which competitive LECs currently operate,'" similar to the forbearance regime that the Commission granted Qwest for mass market switched access services in the *Qwest Omaha Order*.[152] ACS asserts that it should be treated like any other competitive LEC in the Anchorage market based on the high level of competition and elasticity of customer demand.[153] Specifically, ACS seeks forbearance from dominant carrier regulation, comprising rate-of-return regulations, certain related tariffing and pricing rules, and section 214 discontinuance and transfer of control requirements. If granted forbearance from this regulation, ACS proposes to meet certain conditions that provide "further assurance that the interests of both consumers and competition will be promoted."[154] Among other things, ACS agrees to cap at current levels all interstate switched

[148] ACS Petition at 41-42.

[149] *See supra* text accompanying note 145.

[150] *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at Exh. D.

[151] *See infra* note 250.

[152] ACS Reply at 12 (citing *Qwest Omaha Order*, 20 FCC Rcd at 19435, para. 41).

[153] *See*, *e.g.*, ACS Petition at 2. ASC seeks the opportunity to compete on the same terms as competitive LECs for switched access customers "through freedom from a prescribed rate structure and the ability to file tariffs on one-day's notice without cost support, on the condition that ACS cap its access rates at current levels and does not detariff switched or special access services." ACS June 29, 2007 *Ex Parte* Letter at 2. ASC states that it does not seek permissive detariffing of any common carrier services; it agrees to continue to file tariffs for switched access services, including contract tariffs, effective on one day's notice. *Id.* at 2, 5. ACS also agrees to exit the NECA pool. *See* ACS Reply at 13.

[154] ACS June 29, 2007 *Ex Parte* Letter at 1.

access rates, including the SLC, "such that ACS will be unable to increase the price of any individual access service."[155] ACS agrees to be subject to a ceiling for terminating interstate switched access rates as are competitive LECs, which is similar to the ceiling that the Commission imposed on Qwest in the *Qwest Omaha Order*.[156] ACS asserts that it "is willing to accept downward-only pricing flexibility" in order to help it design competitive offerings and better serve its customers.[157]

(i) Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

57. We find that the criteria of section 10 are satisfied with respect to the requested relief for ACS's mass market and enterprise switched access services, subject to the conditions discussed below. First, our forbearance analysis under section 10(a)(1) requires that we determine whether enforcement of the regulations at issue is not necessary to ensure that charges, practices, classifications, or regulations for those services are not unjustly or unreasonably discriminatory.[158] In its petition, ACS argues broadly that certain dominant carrier regulation of interstate switched access services, including end-user charges, is no longer necessary to ensure that ACS's rates and practices are just, reasonable and not unreasonably discriminatory, and that ACS therefore satisfies the criteria of section 10(a)(1) of the 1996 Act.[159] More specifically, it contends that the Anchorage telecommunications market has become highly competitive and that ACS lacks market power.[160] Further, ACS argues that the high level of competition for switched access services in the mass market and enterprise market will ensure that ACS's charges and practices remain just and reasonable and warrants forbearance from dominant carrier regulation of switched access services.[161]

58. *Rate-of-return and Tariffing Forbearance for Switched Access Services*. Based on the significant competition ACS faces for both mass market and enterprise switched access services and on the conditions described below, we conclude that enforcement of dominant carrier rate-of-return regulations and certain related tariffing and pricing rules is not necessary to ensure that ACS's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory with regard

[155] *Id*. at 2. ACS asserts that it will be unable to seek an increase in rates based on changes in costs or earnings. *Id.* ACS further asserts that if the "downward-only pricing flexibility" relief it seeks through forbearance is granted, it would not be able to raise some rates by decreasing others, its "rates would be divorced from its costs, and the earnings review requirement for rate of return carriers would no longer be necessary." *Id*. at 6. We note, however, that ACS is still subject to the statutory requirement that its rates be just and reasonable. 47 U.S.C. § 201. If ACS's rates are challenged, it may be necessary for the Commission to consider its costs and earnings in assessing the reasonableness of its rates.

[156] ACS June 29, 2007 *Ex Parte* Letter at 2, 4; ACS Petition at 50 (citing *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 40-41); *see also* ACS Reply at 3.

[157] ACS June 29, 2007 *Ex Parte* Letter at 2, 6.

[158] *See* 47 U.S.C. § 160(a)(1).

[159] *See* ACS Petition at 29-45.

[160] *See*, *e.g.*, *id*. at 29.

[161] *Id.; see also* ACS Reply at 11.

to end users and access customers.[162] Accordingly, we forbear from those regulations with respect to switched access services.

59. We adopt certain conditions on this grant of forbearance to address the special problem of carrier's carrier charges, where all LECs have monopoly power over the rates that they charge carriers wishing to terminate calls to their end user customers. In the *CLEC Access Charge Reform Order*, the Commission found that interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers' carrier charges cannot be fully deregulated.[163] In addition, section 254(g) requires interexchange carriers to geographically average their rates and thereby to spread the cost of both originating and terminating access over all their end users. Consequently, because interexchange carriers are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs.[164] As a result, the Commission imposed a permissive detariffing regime through section 61.26 that permits the filing of tariffs on one day's notice without cost support (and presumes the access charges that competitive LECs charge their carrier customers to be just and reasonable) where the rates are at or below a benchmark that is "the rate of the competing ILEC."[165] Competitive LECs are subject to mandatory detariffing of any rates that exceed that benchmark.[166] The Commission does not otherwise regulate the rates charged pursuant to any other arrangement that competitive LECs may reach with interexchange carriers.

60. To ensure that our forbearance today does not result in rates that are unjust or unreasonable by virtue of the problems identified in the *CLEC Access Charge Reform Order*, and in light of the "unique nature" of the access market in Anchorage,[167] we condition this forbearance upon: (1) ACS's capping at current levels all of its interstate switched access rate elements, including those charged to carriers and end-users;[168] and (2) ACS's compliance with the same regime under which competitive LECs currently operate, with the exception that ACS must file tariffs for switched access and end-user rates, which may be done on one day's notice,[169] and cannot charge rates higher than the rate ceilings we adopt

[162] Specifically, we forbear from applying the following rules only to the extent they apply to dominant carrier switched access and end-user rates and on the condition ACS complies with provisions applicable to nondominant carriers: 47 C.F.R. §§ 1.773(a)(iii), 61.38, 61.54, 61.58, 61.59, 63.03(b)(2), 63.71, Part 65, Part 69, Subparts A and B.

[163] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38.

[164] *Id*. at 9935-36, para. 31.

[165] *Id*. at 9925, para. 3; *see also* 47 C.F.R. § 61.26.

[166] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40.

[167] *Id*. at 9938, para. 39.

[168] We cap each rate element so rates for some services may not be raised to recapture revenue lost from other services. *See* ACS June 29, 2007 *Ex Parte* Letter at 4. However, we decline to require ACS to cap the rates for its special construction tariffs, which ACS explains are based on "time and materials" charges that have no preset rates. *See id.* at 2 n.1. We find that a cap on special construction tariffs would be difficult to administer in light of the manner in which ACS's special construction rates are determined, and is unnecessary as a condition to satisfy the criteria of section 10, particularly in the switched access market given the ubiquity of ACS's network facilities.

[169] ACS may also file tariffs on seven or 15 days' notice and receive deemed lawful treatment for those rates, similar to competitive LECs.

as conditions in this order. Thus, ACS will be subject to a ceiling on terminating interstate switched access rates similar to the benchmark that the Commission imposed on Qwest pursuant to section 61.26 of the Commission's rules.[170] Accordingly, we extend to ACS the current benchmark that applies to all of its competitors – ACS's tariffed rate as of June 30, 2007 – which will also serve as the benchmark for other LECs operating within ACS's service territory in the Anchorage market.

61. In addition, based on the unique circumstances in the Anchorage market, we grant ACS forbearance from the rate-of-return regulation that applies to ACS's mass market and enterprise switched access services in Anchorage, subject to certain additional conditions. First, as a condition of this relief, ACS may not seek rate increases from the Commission under the rate-of-return framework, which we believe ensures that ACS no longer will have the ability to seek rate increases based on underearnings.[171] Second, we require ACS to continue to file all contract offerings as contract tariffs, as GCI suggests.[172] We agree with GCI that such a requirement will help maintain the transparency, and facilitate the evaluation, of ACS's rates and offerings.[173] As GCI observes, "[r]ate-of-return carriers are currently prohibited from offering switched . . . access services pursuant to individual customer contracts."[174] The transparency associated with ACS's contract tariff filings will aid the evaluation of its compliance with the other conditions of this order, including the requirement that the rates for ACS's switched access services not increase above current levels. Finally, we reject GCI's argument that ACS should not be allowed to obtain deemed lawful treatment of its tariffed rates.[175] Deemed lawful status is available to all LECs, including competitive LECs, that meet the requirements of section 204(a)(3) of the Act, and GCI has shown no reason why deemed lawful status should not apply in the case of ACS.[176] Given these conditions, we find that continued application of dominant carrier tariff filing requirements is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory charges and practices.

62. Further, because ACS's special access services and services outside of the Anchorage study area will remain subject to rate-of-return regulation, we need to ensure that the allocation of common costs assigned to ACS of Anchorage and its affiliates located outside of Anchorage does not disadvantage ACS customers in any area. ACS proposes the following to maintain the allocation of common costs assigned to ACS of Anchorage and its affiliates at current levels:

> The regulated joint and common expenses assigned to ACS of Anchorage as a percentage of regulated joint and common expenses assigned to all commonly owned ACS ILECs will not be lower than in Calendar Year 2005. USF Data Collections reports used to compute Study Area Cost per Loop for each ACS LEC study area will be provided to GCI for the sole purpose of computing the percentage of joint and common expenses

[170] *Qwest Omaha Order,* 20 FCC Rcd at 19435, para. 41; ACS Petition at 50.

[171] ACS June 29, 2007 *Ex Parte* Letter at 2.

[172] *See* Letter from Brita D. Strandberg, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 3 (filed June 6, 2007) (GCI June 6, 2007 *Ex Parte* Letter). We note that ACS agrees to this condition. ACS June 29, 2007 *Ex Parte* Letter at 5.

[173] *See* GCI June 6, 2007 *Ex Parte* Letter at 3.

[174] *Id*. at 3 n.4 (citing Multi-Association Group (*MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Carriers and Interexchange Carriers*, 19 FCC Rcd 4122, 4143-44 (2004)).

[175] *See* GCI Comments at 29.

[176] *See* 47 U.S.C. 204(a)(3).

> assigned to ACS of Anchorage. This percentage will be computed annually by dividing the sum of "Total Corporate Operations" (FCC Part 32 accounts 6710 and 6720, currently line 565) plus total "General Support Expense" (FCC Part 32 Account 6120, currently line 350) for Anchorage (SAC 613000) by the sum "Corporate Operations Expense" and "General Support Expense" for all ACS LEC study areas (ACS-Anchorage, 613000; ACS of the Northland-Sitka, 613020; ACS of the Northland-Glacier State 613010; ACS of Alaska-Greatland, 613022; ACS of Alaska-Juneau, 613022; ACS of Fairbanks 613008). If the calculation for any given year shows that the percentage of "Corporate Operations Expense" and "General Support Expense" assigned to ACS of Anchorage has decreased below the 2005 percentage, joint and common expenses in the final access cost studies and USF submissions for all other ACS study areas will be adjusted downward proportionately. The downward adjustment will be of a magnitude that a re-computation of the USF Data Collection reports using the adjusted numbers would bring the percentage of joint and common expenses assigned to ACS of Anchorage up to the 2005 ratio.[177]

We adopt this proposal as a condition of this order to address concerns that ACS might recover costs disproportionately from customers in other areas of Alaska.

63. *Discontinuance and Streamlined Transfer of Control Forbearance*. For all mass market and enterprise switched access services, we find that continued application of our dominant carrier discontinuance rules is not necessary to ensure that ACS's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory so long as discontinuance of service by ACS is subject to the Commission's discontinuance rules for nondominant carriers.[178] We conclude that subjecting ACS to a 60-day automatic grant period for discontinuance of service, and a 30-day comment period for affected customer notice, is not necessary under section 10(a)(1), where GCI and other competitive LECs are subject to a 30-day automatic grant period and 15-day comment period. Where such a significant share of customers have selected carriers other than ACS, we find that continuing to impose more onerous discontinuance requirements on ACS is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory charges and practices. As a condition of this forbearance and to ensure the criteria of section 10 are satisfied, we require ACS to comply with the discontinuance requirements that apply to nondominant carriers.[179] For similar reasons, we forbear from

[177] ACS July 25, 2007 *Ex Parte* Letter at 2.

[178] 47 C.F.R. § 63.71(a)(5), (b)(4), (c).

[179] *See id*. § 63.71. We note that ACS also proposes to condition forbearance from dominant carrier regulation of its special access services generally on ACS being prohibited from withdrawing any currently available interstate access service absent GCI's approval. *See* ACS July 25, 2007 *Ex Parte* Letter at 3 ("If GCI is using any interstate access service that ACS wishes to discontinue, ACS will leave that service in place and fulfill new orders for that service for GCI at the then-effective rate until GCI chooses to discontinue the service."). We further note that GCI asserts that this condition, in conjunction with the other conditions in the record, would be sufficient to ameliorate its concerns about special access forbearance. *See* Letter from John T. Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed July 30, 2007) (GCI July 30, 2007 *Ex Parte* Letter). Nonetheless, we do not find that condition sufficient or appropriate to address the concerns discussed above that lead us to conclude that the requested special access forbearance does not satisfy section 10. In particular, even if the additional proposed condition addresses the concerns of GCI, it does not address ACS's other special access customers. Thus, we find it insufficient, even in conjunction with other conditions in the record, to satisfy any of the prongs of section 10(a) with respect to ACS's special access services generally. Moreover, the condition would appear to favor GCI over other competitors, which we find inconsistent with the public interest under section 10(a)(3).

applying our streamlined transfer of control rules to ACS as a dominant carrier, conditioned upon treatment of ACS as a non-dominant carrier under these rules.[180]

(ii) Section 10(a)(2) – Protection of Consumers

64. The second criterion under section 10 requires that we assess whether enforcement of the Commission's dominant carrier regulations as they apply to mass market and enterprise interstate switched access rates, including end-user charges, is not necessary for the protection of consumers.[181] ACS asserts that it satisfies the criteria of section 10(a)(2) because the "high level of facilities-based competition in Anchorage and the continued regulation of ACS's rates and practices" will protect consumers.[182] In particular, ACS asserts that, in addition to competition, requirements other than dominant carrier regulation, such as sections 201 and 202 of the Act, are sufficient to protect consumers from any carrier attempting to charge unreasonable rates.[183] It further argues that forbearance from certain dominant common carrier regulation would allow ACS greater flexibility with respect to its pricing and service offerings that would benefit consumers.[184] Moreover, ACS asserts that its proposal to cap at current levels all switched access rates and accept downward-only pricing flexibility will further protect consumers.[185]

65. For many of the same reasons that led us to conclude that section 10(a)(1) is satisfied, we also conclude that section 10(a)(2) is satisfied with regard to a limited set of dominant carrier regulations, comprising rate-of-return regulations, certain related tariffing and pricing rules, and section 214 regulation.[186] Most notably, in light of GCI's capture of **[REDACTED]** residential access lines compared to ACS's **[REDACTED]** residential access lines,[187] and GCI's **[REDACTED]** enterprise switched access lines compared to ACS's **[REDACTED]** business retail switched access lines,[188] continuing to subject ACS to these requirements does not enhance consumer protection. Also critical to our finding that consumers will not be harmed is the condition requiring ACS to cap all of its switched access rates at current levels on an "absolute" basis for each rate element, rather than on an averaged basis. Thus, consumers will be protected by this downward-only pricing flexibility for ACS, and there will be no opportunity for the rates of some elements to be raised to recapture revenue lost from other

[180] 47 C.F.R. § 63.03(b)(2).

[181] 47 U.S.C. § 160(a)(2).

[182] ACS Reply at 23; *see also* ACS Petition at 45-51.

[183] *See* ACS Reply at 24. Section 201 of the Act mandates that carriers engaged in the provision of interstate or foreign communication service provide service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable. 47 U.S.C. § 201. Section 201 also empowers the Commission to require physical connections with other carriers, to establish through routes, and to determine appropriate charges for such actions. *Id*. Section 202 states that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons. *Id*. § 202.

[184] ACS Petition at 2-3.

[185] *See* ACS June 29, 2007 *Ex Parte* Letter at 4, 6.

[186] *See supra* paras. 58, 63.

[187] *See supra* para. 39.

[188] *See supra* para. 43.

services.

(iii) Section 10(a)(3) – Public Interest

66. The third criterion of section 10 requires that we determine whether forbearance from applying our dominant carrier regulations for switched access services and end-user charges, including our rate-of-return regulations, related tariffing and pricing requirements, and our section 214 transfer of control requirements, is consistent with the public interest.[189] In making this determination, the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[190] ACS argues that "asymmetric regulation is hobbling the ability of ACS to compete with its more than evenly matched competitor in GCI."[191] ACS, for example, argues that it faces burdensome dominant carrier tariffing requirements, like those that applied to Qwest prior to the relief granted in the *Qwest Omaha Order*.[192] ACS argues that a grant of forbearance relief is in the public interest because it will promote competitive market conditions by allowing ACS greater flexibility in its price and service offerings, "likely triggering better price and service offerings from GCI."[193]

67. Consistent with our findings in the *Qwest Omaha Order,* we conclude that forbearing from our dominant carrier regulations that apply to interstate switched access rate elements, including those charged to both carriers and end-users, is consistent with the public interest.[194] Specifically, we find that such forbearance will enhance the vigorous competition that has emerged in the Anchorage market and will serve the public interest. Accordingly, we no longer apply to ACS the dominant carrier regulations that apply to interstate switched access and end-user services, including our rate-of-return regulations, related tariffing and pricing requirements, and our section 214 requirements.[195] We believe that ACS will price its mass market and enterprise interstate switched access services competitively without this level of burdensome regulatory oversight because it is subject to sufficient competition.[196] Further, as the Commission stated in the *Qwest Omaha Order,* in environments that are competitive for end users, applying dominant carrier regulations limits a carrier's "ability to respond to competitive forces and,

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[189] 47 U.S.C. § 160(a)(3).

[190] *Id*. § 160(b).

[191] ACS Petition at 52.

[192] *Id.* (citing *Qwest Omaha Order*, 20 FCC Rcd at 19437, para. 46 nn.116-17). ACS states that the 15-day tariff notice requirement that applies to it gives competitive LECs the opportunity to respond to ACS's filed rate or service changes or to get to market first with a new price or service offering before ACS tariff becomes effective. *Id.* ACS further states that this loss of the "first mover advantage" deprives ACS "of any incentive to file for reduced prices because GCI always can beat it to the market," thus depriving consumers of the benefits of greater competition. *Id.*

[193] *See*, *e.g.*, ACS Shelanski Decl. at 14.

[194] 47 U.S.C. § 160(a)(3).

[195] Congress has directed us to consider, in making our determination under section 10(a)(3), whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *See* 47 U.S.C. § 160(b). As discussed above, our forbearance from applying certain dominant carrier regulation to ACS will enhance the vigorous competition in the Anchorage market.

[196] *See supra* para. 65.

therefore, its ability quickly to offer consumers new pricing plans or service packages."[197] Similarly, forbearance in these circumstances will help ACS compete more vigorously and offer consumers more choice and prices that respond to market forces.

68. We also do not believe that reduced regulation will harm competition or consumers. Significantly, as discussed above, we have found that the ceiling we impose on individual switched access rate elements as a condition of our forbearance provides protection against the possibility that competition might be harmed. Market pressures, moreover, created by GCI and other competitors, will force ACS to price its interstate exchange access services competitively, or face further loss of market share for these services.[198] As a result of ACS's substantially diminished market position in Anchorage, rate-of-return regulation and related rules, such as section 61.38 which requires the provision of cost support for rate changes, no longer serve their intended regulatory purpose with respect to interstate switched access and end-user rates in Anchorage, and thus this level of burdensome regulation is not consistent with the public interest.[199]

69. We agree with GCI, however, that to ensure that the increased regulatory parity between ACS and competing carriers such as GCI is in the public interest, it is necessary to adopt certain additional conditions on ACS, besides the ceiling on individual rate elements. First, we condition our grant of forbearance on ACS's not participating in the NECA pooling process and tariffs for the Anchorage study area.[200] As a member of the NECA common line pool, ACS would receive payment of its costs from NECA irrespective of the amount that ACS actually collects from its customers.[201] We agree with GCI that permitting ACS to remain in the NECA pool with regard to Anchorage would provide an implicit subsidy unavailable to its competitors and at odds with ACS's request to end rate-of-return regulation.[202] We also note that ACS does not object to this condition.[203]

70. Second, we condition ACS's receipt of ICLS. In the *MAG Order*, the Commission created the ICLS mechanism to compensate rate-of-return carriers for the interstate loop costs that they could not otherwise recover due to the cap on the SLCs that rate-of-return carriers assess on their end-user customers.[204] ACS seeks forbearance from the SLC caps applicable to rate-of-return carriers.[205] Upon

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[197] *Qwest Omaha Order,* 20 FCC Rcd at 19437, para. 47.

[198] We again rely on the benchmark condition described above to correct for the fact that the access service market otherwise does not allow competition to discipline rates.

[199] 47 C.F.R. § 61.38.

[200] ACS requests forbearance from section 69.3(e)(9) of the Commission's rules to allow it to exit the NECA pool for the Anchorage study area but to keep its remaining study areas in the NECA pool. ACS July 25, 2007 *Ex Parte* Letter at 2; *see* 47 C.F.R. § 69.3(e)(9)(requiring that a telephone company and its affiliates participate in the NECA common line tariff pool with respect to all study areas). We find that to avoid disruption to customers in ACS's study areas outside Anchorage and because a condition of the forbearance granted by this order requires ACS to exit the NECA pool for the Anchorage study area, there is good cause to waive this rule. 47 *id*. § 1.3; *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), *cert. denied*, 409 U.S. 1027 (1972). We thus deny as moot ACS's request that we forbear from application of this rule.

[201] GCI Comments at 24.

[202] *Id*. at 24-25.

[203] ACS June 29, 2007 *Ex Parte* Letter at 8.

[204] *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge* (continued….)

grant of its forbearance request, ACS would no longer be subject to the SLC caps, and would therefore be able to fully recover its common line costs from its end users, negating its eligibility to receive ICLS. ACS, however, has agreed to cap its interstate switched access rates, including its SLCs, at their current levels.[206] Given that ACS's SLCs will be capped at their current levels, thereby precluding ACS from increasing these rates to recover its interstate loop costs, we believe that it is consistent with the purpose of the ICLS mechanism to permit ACS to continue to be eligible to receive ICLS. ACS will remain eligible to receive ICLS only so long as its SLCs remain capped at current levels.[207]

71. ICLS is provided to both rate-of-return ETCs and competitive ETCs in a study area based on the incumbent LEC's embedded costs.[208] After the grant of its forbearance request becomes effective, ACS will no longer be required to calculate its common line revenue requirement per study area pursuant to Part 69 of the Commission's rules.[209] Therefore, ACS's ICLS amounts will no longer be calculated in the same manner as is ICLS for other rate-of-return regulated incumbent LEC ETCs pursuant to section 54.901(a).[210] GCI has proposed, and ACS has agreed, that, as a condition of granting its forbearance request, ACS's ICLS amounts would be set at the current competitive ETC per-line level.[211] After grant of the forbearance request, all ETCs in ACS's Anchorage study area, including ACS, would receive ICLS at the same per-line support amounts. We find that ACS's ICLS shall be set at the per-line level of ICLS

(Continued from previous page)
Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19667, para. 128 (2001) (*MAG Order*).

[205] 47 C.F.R. § 69.104. Section 69.104 is in subpart B of the Commission's Part 69 rules. 47 C.F.R. Part 69, Subpart B. ACS seeks forbearance from subparts A and B of the Commission's Part 69 rules. ACS Petition, App. A at 5.

[206] ACS June 29, 2007 *Ex Parte* Letter at 2 (stating that "all regulated interstate access rates will be capped at current rate levels, such that ACS will be unable to increase the price of any individual access service").

[207] The Commission has adopted ACS's commitment to cap its interstate switched access rates, including its SLCs, as a condition of forbearance. ACS's SLC caps, therefore, cannot be eliminated or modified absent future Commission action.

[208] 47 C.F.R. § 54.901.

[209] *Id*. § 54.901(a) (providing that ICLS for rate-of-return ETCs is based on their common line revenue requirements per study area, minus certain enumerated amounts).

[210] *Id.*

[211] GCI Reply Comments at 26; ACS Reply Comments at 13; 47 C.F.R. § 54.901(b). ACS requests forbearance from the revenue requirement calculations in section 54.901(a) of the Commission's rules, and from section 54.903 of the Commission's rules, to the extent it requires ACS to file FCC Forms 508 and 509. ACS July 25, 2007 *Ex Parte* Letter at 4; *see* 47 C.F.R. §§ 54.901(a), 54.903 (requiring rate-of-return carriers to file FCC Form 508 - ICLS Projected Annual Common Line Revenue Requirement, and FCC Form 509 - ICLS Annual Common Line Actual Cost Data Collection). We find that, because a condition of the forbearance granted by this order requires ACS to receive ICLS at the existing per-line rate, rather than based on the rate-of-return regulated carrier requirements in section 54.901(a), there is good cause to waive these rules. 47 C.F.R. § 1.3; *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), *cert. denied*, 409 U.S. 1027 (1972). We thus deny as moot ACS's request that we forbear from application of these rules.

provided to competitive ETCs on the effective date of this order subject to Commission modification in its universal service reform proceedings.[212]

72. We note that our grant of ACS's forbearance petition in no way alters its obligation to contribute to the universal service fund.[213] After grant of its request, to the extent that ACS chooses to no longer assess federal end-user subscriber line charges, ACS must identify the interstate portion of fixed local exchange service revenues for universal service contribution purposes.[214] ACS states that it will impute the tariffed SLC rates when calculating its universal service contributions.[215] As discussed above, as a condition of this forbearance grant, ACS's SLC rates will be capped. ACS will be able, however, to reduce its tariffed SLC rates, thereby reducing the amount it contributes to the universal service fund.[216] To preclude ACS from using its forbearance grant to significantly reduce its universal service contribution amounts, therefore, ACS shall use the June 30, 2007, residential and single-line business SLC rate and the multi-line business SLC rate to calculate the interstate end-user revenues on which its universal service contributions are based. In addition, we note that section 54.712 of the Commission's rules dictates the manner in which contributors to the universal service fund are permitted to recover their contributions from end users.[217]

73. We believe that this conditional forbearance from dominant carrier regulation in Anchorage will serve the public interest by increasing the regulatory parity among providers of mass market interstate exchange access services in that market. As a result of our decision today, the playing field between ACS and GCI will be leveled to the extent ACS will no longer be subject to dominant carrier regulations for its mass market and enterprise interstate switched access services. In light of the competitive findings above, we believe this outcome is warranted and serves the public interest.[218]

b. Mass Market Broadband Internet Access Transmission Services

74. We find that the criteria of section 10 are satisfied with respect to the requested conditional relief for ACS's mass market broadband Internet access transmission services, conditioned upon ACS filing, and having approved by the Commission, a description of how it will address the cost allocation implications of this forbearance before it exercises this relief. In the *Qwest Omaha Order*, the Commission granted Qwest forbearance from rate-of-return and tariffing requirements for mass market broadband Internet access transmission services.[219] Subsequent to the adoption of the *Qwest Omaha Order*, the Commission released its *Wireline Broadband Internet Access Services Order*, which, among

[212] We note that the per-line ICLS amount must be based on actual common line cost and revenue data pursuant to section 54.903(a)(4) of the Commission's rules. 47 C.F.R. § 54.903(a)(4). Because the effective date of this order falls during the last two quarters of the calendar year, the per-line ICLS in Anchorage is based on the actual common line cost and revenue data filed by ACS on December 31, 2006. *Id.* Therefore, we find it appropriate to set ICLS support at this rate.

[213] *See* 47 C.F.R. §§ 54.706, 54.709.

[214] *See* Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions at 25 (2007).

[215] ACS July 25, 2007 *Ex Parte* Letter at 4.

[216] *See* 47 C.F.R. § 54.709 (contributions to the universal service fund are based on end-user telecommunications revenues).

[217] *See id*. § 54.712.

[218] *See supra* para. 65.

[219] *Qwest Omaha Order*, 20 FCC Rcd at 19435, para. 42.

other things: (1) determined that wireline broadband Internet access service is an information service; (2) concluded that the wireline broadband Internet access services market is an evolving market characterized by emerging intermodal and intramodal competition; and (3) held that facilities-based wireline broadband Internet access service providers were free to offer the transmission component of wireline broadband Internet access service on either a common carrier or non-common carrier basis, if they chose. Consequently, the *Wireline Broadband Internet Access Services Order* effectively supplants the need for relief for these services like that granted in the *Qwest Omaha Order*, at least for price cap carriers.[220]

75. With respect to rate-of-return carriers, the Commission likewise granted relief from tariffing requirements for wireline broadband Internet access transmission services. However, with respect to rate regulation, and the ability to offer wireline broadband Internet access transmission services on a non-common carrier basis, the Commission further observed in the *Wireline Broadband Internet Access Services Order* that "all rate-of-return carriers that have participated in this proceeding have stated that they wish to continue offering broadband transmission service as a Title II common carrier service."[221] Thus, the Commission did not address cost allocation issues for rate-of-return carriers that, as a practical matter, are a prerequisite to a carrier's availing itself of the ability to offer the transmission component of wireline broadband Internet access services on a non-common carrier basis.[222] Rather, the Commission held that "[i]n the event that an earnings determination is needed for some ratemaking purpose," as would be the case under rate-of-return regulation, "the affected carrier will have to propose a way of removing the costs of any non-Title II services from the computation."[223] This was necessary because the Commission found that, although carriers were allowed to offer wireline broadband Internet access transmission service on a non-common carrier basis, for accounting purposes the activities of incumbent LECs associated with these offerings would continue to be treated as regulated under Part 64 of the Commission's rules.[224] Thus, unless there likewise is an appropriate allocation of a rate-of-return carrier's costs for the non-common carrier provision of DSL transmission service, those costs could be recovered through increases in the rates for other interstate special access services that remain subject to rate-of-return regulation.

76. Although the *Wireline Broadband Internet Access Services Order* was not principally conducted as a section 10 forbearance proceeding, the Commission concluded in that order that "the reasons that persuade us not to require that the transmission component of wireline broadband Internet access service be offered as a telecommunications service under Title II also persuade us that application of the tariffing provisions in Title II is 'not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory' within the meaning of section 10(a)(1)."[225]

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[220] We note that although the *Wireline Broadband Internet Access Services Order* was adopted before the *Qwest Omaha Order,* the *Wireline Broadband Internet Access Services Order* relief did not take effect until November 16, 2005, which was after the Qwest Omaha forbearance statutory deadline. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 70 Fed. Reg. 60222 (Oct. 17, 2005).

[221] *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14927, para. 138.

[222] *See id.*

[223] *Id*. at 14927, para. 137.

[224] *Id*. at 14926, para. 135.

[225] *Id*. at 14902, para. 91.

77. The Commission went on to hold in the *Wireline Broadband Internet Access Services Order*, that "[t]he need to attract end user and ISP customers also makes clear that tariffing 'is not necessary for the protection of consumers' within the meaning of section 10(a)(2)."[226] In particular, the Commission found that regulatory relief would better enable carriers to offer innovative service arrangements than would be the case if tariffing obligations applied.[227]

78. Finally, in the *Wireline Broadband Internet Access Services Order*, the Commission concluded that regulatory relief for broadband Internet access telecommunications offerings is in the public interest within the meaning of section 10(a)(3) because it gives carriers greater freedom in how they offer broadband Internet access transmission as a telecommunications service, promoting competitive market conditions.[228]

79. We find no basis in the record for reaching a different conclusion here, and likewise find that the criteria of section 10 are met. We note that the evidence indicates that ACS already faces significant intermodal competition for broadband Internet access services today. Although the analysis of the market for broadband Internet access service does not hinge on static market share data, we note that the evidence regarding the Anchorage market supports the finding of significant intermodal broadband Internet access competition, with ACS possessing **[REDACTED]** of the broadband Internet access services market.

80. As discussed above, however, before a carrier may exercise the regulatory relief (beyond relief from tariffing obligations) granted in the *Wireline Broadband Internet Access Services Order*, the Commission identified an additional issue – cost allocation – that would need to be addressed by providers, such as rate-of-return carriers, for which an earnings determination is used for ratemaking purposes. We find that ACS has not addressed the cost allocation concerns here, given the continued rate of return regulation of its special access services, as well as its services outside of the Anchorage study area. Consequently, we require as a condition of forbearance that ACS file, and have approved by the Commission, a description of how it will address the cost allocation implications of this forbearance before it exercises this relief.[229] Our evaluation of ACS's proposed cost allocation for these services thus will help to ensure that the rates for special access services will continue to be just and reasonable.

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[226] *Id*. at 14902, para. 92.

[227] *Id*.

[228] *Id*. at 14902, para. 93.

[229] To comply with this requirement in the event ACS intends to offer these services directly on a non-common carrier basis, ACS must file with the Commission a detailed description of the methods it will use to ensure that the costs and revenues of its wireline broadband Internet access transmission operations are excluded from the ratemaking calculations for those services that are still subject to Title II regulation. In particular, ACS must address in its filing how it will allocate relevant costs between those services it will offer on a non-Title II basis and those services that remain subject to Title II regulation. Additionally, ACS shall identify in its cost support for all future interstate tariff filings, the costs and revenues it has removed from its interstate ratemaking computations for those of its wireline broadband Internet access transmission services that are classified as regulated for cost allocation purposes, but are not subject to Title II regulation as a result of this forbearance relief. In particular, without deciding here what an appropriate allocation would be, any allocation of costs and revenues proposed by ACS should not result in an increase in special access rates due to the relief granted herein. Alternatively, if ACS chooses to offer wireline broadband Internet access transmission on a non-common carrier basis through a nonregulated affiliate, it must comply with the affiliate transactions rules for any transactions it has with that affiliate in connection with those transmission services. *See* 47 C.F.R. § 32.27.

81. We note that ACS does not seek, nor do we grant in this order, forbearance from section 254(k) of the Act as it applies to ACS's mass market broadband Internet access services. That section provides that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition, and that "[t]he Commission, with respect to interstate services, . . . shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." We find that specifying ACS's responsibility prior to it availing itself of the forbearance relief for wireline broadband Internet access transmission service is necessary to fulfill section 254(k)'s mandate that the Commission "shall" ensure that telecommunications carriers comply with the requirements of section 254(k). We further observe that, were such legal obligations not to apply to ACS, forbearance would not be warranted.[230] Rather than denying such forbearance relief,[231] we find it consistent with the deregulatory goals of section 10,[232] and

[230] As an initial matter, we find that the forbearance sought by ACS would not be in the public interest under section 10(a)(3) absent this action by ACS. We find that the *Wireline Broadband Internet Access Services Order*'s framework struck the appropriate balance between deregulation, in light of the competition in the emerging market for wireline broadband Internet access services, and the mandates of section 254(k). *See generally Wireline Broadband Internet Access Services Order*, 20 FCC Rcd 14853. Although the evidence in this proceeding is *consistent* with the findings in the *Wireline Broadband Internet Access Services Order*, we find no basis in this record to deviate from that framework with respect to the necessity of addressing cost allocation issues before providers, such as rate-of-return carriers, for which an earnings determination is used for ratemaking purposes could avail themselves of regulatory relief. Thus, in light of the Commission's prior determination that its *Wireline Broadband Internet Access Services Order* framework struck the proper public interest balance, including both the relief granted and its identification of the cost allocation concerns that must be addressed, we find that deviation from that framework would not be in the public interest. *Fones4all Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd 11125, 11132-22, para. 14 (2006) (concluding that it would not be in the public interest for the Commission to forbear from its unbundling rules where the petitioner had not presented any new evidence or change in circumstances that would warrant revisiting the Commission's carefully calibrated balancing test under section 251(d)(2)(B) to determine the appropriate amount of unbundling). We likewise find that, absent this action by ACS, ACS's requested forbearance does not satisfy sections 10(a)(1) or (a)(2). As noted above, because ACS's wireline broadband Internet access transmission revenues are treated as regulated for accounting purposes, they would be included as part of a ACS's special access revenues for purposes of rate-of-return calculations, and thus an allocation would be necessary. Therefore, absent an appropriate allocation of the carrier's costs for wireline broadband Internet access transmission service, those costs could be recovered through increases in the rates for other interstate special access services that remain subject to rate-of-return regulation. Such rates would not be "just and reasonable" as required by section 10(a)(1) to justify forbearance, and the increased rates would harm consumers, including wholesale customers that rely on those special access inputs for their retail services, in contravention of the standard in section 10(a)(2).

[231] Such denial would necessitate that ACS file one or more additional forbearance petitions until such time as ACS, or other commenters, provide an adequate basis in the record for the Commission to address the cost allocation issues in that proceeding. Of course, ACS is free to do so, if it so chooses.

[232] 47 U.S.C. § 160. *See*, *e.g.*, *AT&T v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006) ("Critical to Congress's deregulation strategy, the [1996] Act added section 10 to the Communications Act of 1934."); *2000 Biennial Regulatory Review*, IB Docket No. 00-202, Notice of Proposed Rule Making, 15 FCC Rcd 20008, 20010, para. 1 (2000) ("The major purpose of the 1996 Act is to establish 'a pro-competitive, deregulatory national policy framework' designed to make available to all Americans advanced telecommunications and information technologies and services 'by opening all telecommunications markets to competition.' Congress empowered the Commission with an important tool to realize this goal in Section 10 of the Act.") (citations omitted).

with Commission precedent,[233] to clarify this legal precondition for ACS to avail itself of the forbearance for its DSL transmission service.[234]

c. Regulation of Special Access Services

82. ACS also seeks conditional forbearance from dominant carrier tariffing and rate-of-return pricing regulation for its interstate special access services as a whole.[235] We are not persuaded by the record evidence that the standards of section 10 are satisfied with respect to such services. Therefore, we deny ACS's request for the conditional forbearance it seeks for its interstate special access services at this time.

83. As an initial matter, we note that, although ACS contends that the relief it seeks is consistent with the *Qwest Omaha Order*, the Commission in that order denied Qwest forbearance from dominant carrier regulation as it applies to any of Qwest's special access services. Specifically, the Commission denied that aspect of Qwest's petition because it found that "Qwest ha[d] not provided sufficient data for its service territory for the entire MSA to allow [the Commission] to reach a forbearance determination under section 10(a) for the enterprise market," which the Commission in that order took to include all special access services.[236] Similarly here, we find that ACS has not provided sufficient data to convince us that granting ACS the conditional relief it seeks for special access services would be consistent with each of the standards of section 10.[237] In particular, the data submitted do not enable us to conclude that there is sufficient competition with respect to interstate special access services generally, nor to conclude that forbearance would be justified under section 10 notwithstanding our inability to make such a finding.

84. In conducting our forbearance analysis, and consistent with the Commission's prior decisions, we examine the status of competition in the retail and wholesale markets.[238] As described above, the available data do not allow us to calculate precise market shares for retail special access services in the Anchorage study area.[239] More significantly, although the record contains general information about the scope of GCI's facilities deployment,[240] as discussed in greater detail above, those

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[233] *See*, *e.g.*, *Qwest Communications International, Inc. and U S WEST, Inc., Applications for Transfer of Control, Memorandum Opinion and Order*, CC Docket No. 99-272, 15 FCC Rcd 5376, 5407, para. 64 (2000) (approving the proposed merger between Qwest and U S WEST subject to the condition that the merger could not be consummated until the issuance by the Commission of a subsequent order stating that the proposed divestiture [of Qwest's interLATA assets and services within the U S WEST region] results in a merger that complies with section 271).

[234] For these reasons, we find that this holding is not at odds with section 10's statutory deadline. *See* 47 U.S.C. § 160(c).

[235] *See supra* para. 20.

[236] *See Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50; *see also id*. at 19428, para. 22 n.66 (stating that all special access services are addressed in the enterprise section).

[237] However, unlike the Qwest Omaha proceeding, for the reasons explained elsewhere in this order, we are able to grant ACS the relief it seeks regarding enterprise switched access services. *See supra* Part IV.D.3.a.

[238] *See ACS UNE Order*, 22 FCC Rcd at 1974, paras. 26-27; *see also Qwest Omaha Order*, 20 FCC Rcd at 19447-52, paras. 65-72; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505, para. 21 (considering the wholesale market in conjunction with the retail market given the nature of relief requested).

[239] *See supra* at paras. 50-**Error! Reference source not found.**.

[240] *See supra* at Part IV.D.2.d.

data do not enable us to adequately determine market shares.[241] The absence of such market share evidence to use as a starting point for our analysis significantly hinders our ability to analyze on this record whether there is sufficient competition for interstate special access services throughout the Anchorage MSA.[242] This has implications for retail enterprise services provided using special access inputs, as well. Although the data on the record do not permit us to draw definitive conclusions based on market shares for retail special access services, the record suggests that a substantial amount of retail competition is based on special access inputs from ACS.[243]

85. Thus, in contrast to the relief from dominant carrier regulation granted in the *Qwest Omaha Order* and granted elsewhere in this order, we are unable to rely on the findings of our competitive analysis to justify forbearance from dominant carrier regulation of special access services. However, although the traditional market power inquiry informs our forbearance analysis, the inability to fully perform such an analysis is not necessarily dispositive in and of itself.[244] Rather, we proceed to evaluate the evidence in the record to determine if forbearance nonetheless is justified in this particular instance under the specific factors identified in section 10. As explained above, ACS has proposed certain forbearance conditions, such as capping its prices for special access services at current rates, that it contends are sufficient to satisfy the criteria of section 10 and entitle it to forbearance relief. In this case, however, we find such evidence insufficient to demonstrate that forbearance from dominant carrier regulation is warranted.[245]

86. As explained above, ACS has proposed capping tariffed special access rates, and continuing to tariff special access services (albeit on the same basis as competing carriers) as conditions of granting forbearance from dominant carrier regulation pricing and tariffing regulation of ACS's special access services as a whole.[246] It claims that these proposed conditions are sufficient to satisfy the criteria of section 10 and entitle it to forbearance relief. We are not persuaded, however, that the conditions proposed by ACS are sufficient to ensure that ACS's rates and practices would be just, reasonable, and not unjustly or unreasonably discriminatory as required to satisfy section 10(a)(1).

87. First, assuming *arguendo* that the conditions ACS proposes would be sufficient to ensure that the rates for ACS's interstate special access services would be just and reasonable, ACS would still have the incentive and ability to increase its rivals' costs by manipulating the terms and conditions under which

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[241] *See supra* text accompanying note 145.

[242] We recognize that market share data are not the sole evidence considered as part of the traditional market power analysis. *See*, *e.g.*, *AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (criticizing the Commission's failure to consider factors in addition to market share). However, an evaluation of market share data typically is the starting point for, and a important component of, that analysis.

[243] *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at Exh. D (showing that GCI and AT&T Alascom each purchase **[REDACTED]** wholesale special access circuits from ACS **[REDACTED]**). We note that the record is virtually silent regarding the extent to which AT&T Alascom has deployed its own special access facilities.

[244] As the Commission stated in the *Qwest Omaha Order*, although it "look[s] to the Commission's previous caselaw on dominance for guidance," the traditional market power inquiry does not "bind [the Commission's] section 10 *forbearance* analysis." *Qwest Omaha Order*, 20 FCC Rcd at 19423-25, paras. 14, 17 n.52.

[245] We note that elsewhere in this order, we find that similar proposed conditions, in conjunction with evidence suggesting that ACS lacks market power for the relevant services, warrant forbearance from dominant carrier regulation. *See* Part IV.D.3.a.

[246] *See* ACS June 29, 2007 *Ex Parte* Letter at 1-2; *see also supra*, para. 56.

it offered and provisioned such services.[247] ACS's proposed condition, while it precludes it from increasing tariffed special access rates, does not protect against any non-price ability to raise rivals' costs, and thus does not fully ameliorate competitive concerns.

88. Second and relatedly, we find ACS's proposal that it continue to tariff its special access services, but on one day's notice, to be insufficient to ensure that the rates, terms, and conditions of ACS's special access tariffs will be just, reasonable, and not unjustly or unreasonably discriminatory.[248] Specifically, with a one-day tariff notice period, the Commission would be unable to ensure that ACS did not include unreasonable or discriminatory terms in its tariffs. Where the Commission has allowed the filing of tariffs on one day's notice it has been predicated on evidence of competition, which the Commission expected to constrain the carrier's behavior.[249] The lack of a comparable competitive showing here, combined with the concerns expressed above regarding ACS's incentive and ability to engage in non-price discrimination to raise its rivals' costs, leads us to conclude that ACS's proposal to tariff its special access services on one day's notice is not sufficient to ensure that its special access practices are not unjust, unreasonable, or unjustly or unreasonably discriminatory. Thus, we are not persuaded that ACS would no longer have the ability to raise rivals' costs by virtue of its proposed conditions.

89. As support for our conclusion, we also note that none of the commenters in this proceeding support ACS's conditional request for forbearance to the extent it applies to special access services as a whole, notwithstanding that ACS's largest competitor in the enterprise market – GCI – supports the conditional forbearance relief we grant in this order for switched access and other services.[250] This

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[247] *See*, *e.g.*, *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5234-35, para. 54 (concluding that, given the Commission's assumption for purposes of that proceeding that Qwest continued to possess exclusionary market power by virtue of its local network, it could have the incentive and ability to engage in non-price discrimination against competitors absent the conditions adopted in that order and other remaining regulatory requirements).

[248] *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at 5.

[249] *See*, *e.g.*, *Tariff Filing Requirements for Non-Dominant Carriers*, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6756, para. 23 (2003) (holding that in light of "significant competition that has developed since the adoption of the Commission's Competitive Carrier decision, advance scrutiny of the interstate tariffs of nondominant carriers is unnecessary to protect the public interest . . . because by definition nondominant carriers cannot exercise market power, unlawful tariffs should be rare"), *vacated on other grounds*, *Southwestern Bell v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *Nondominant Tariff Filing Order*, 10 FCC Rcd at 13653-54, paras. 3-4 (reinstating tariff filing on one day's notice).

[250] *See*, *e.g.*, GCI Comments at ii-iii (opposing all special access relief and stating that "GCI does not oppose all, or even most, of ACS's request for relief with respect to switched access services"); Sprint Nextel Reply at 2-3 (arguing that forbearance is unwarranted because ACS retains market power over special access services necessary for competitors to provide their own retail services); Time Warner Telecom Comments at 10-11 (noting the insufficiency of the data regarding special access services and arguing that even if such insufficiencies are overlooked, forbearance is unwarranted for special access services given competitors dependence on ACS for wholesale special access inputs). Moreover, as GCI notes, in contrast to the switched access context, UNEs are frequently not available as an alternative for wholesale special access services. *See* GCI Comments at 12 (stating that use restrictions on UNEs limit their utility as a special access replacement); GCI June 6, 2007 *Ex Parte* Letter at 1-2 (same); *see also* 47 U.S.C. § 51.309(b) (stating that a requesting telecommunications carrier may not access UNEs for the exclusive provision of interexchange services or CMRS services). Late in the proceeding, GCI stated that if the Commission would adopt all of the conditions ACS proposed, GCI would not object to the requested forbearance, including for special access. GCI July 30, 2007 *Ex Parte* Letter at 2. We have not adopted each of the conditions GCI proposed. In particular, we do not adopt a condition ACS proposes to condition forbearance from (continued….)

reinforces our conclusion that the competitive concerns raised by ACS's conditional forbearance request preclude a finding that dominant carrier pricing and tariffing regulations are not necessary to ensure that ACS's special access services are offered on a just, reasonable, and not unjustly or unreasonably discriminatory basis under section 10(a)(1).

90. For similar reasons, we also conclude that ACS has not demonstrated that these requirements are not necessary for the protection of consumers under section 10(a)(2). To the extent that ACS retains the ability to raise rivals' costs through the provisioning of its special access services, end-user prices may rise, and consumers may be harmed as a result.[251] We find that the dominant carrier regulations at issue are still necessary to ensure competition in this market and ultimately to protect consumers.

91. Finally, ACS has not demonstrated that the requested forbearance relief is consistent with the public interest, as required by section 10(a)(3).[252] In considering whether the requested relief is consistent with the public interest, section 10(a)(3) requires us to consider whether the requested relief "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[253] We find that granting ACS relief from dominant carrier regulation with respect to its provision of special access services would not enhance competition in the Anchorage study area as contemplated in section 10(a)(3), but would likely reduce competition. As explained above, the record indicates that ACS could engage in non-price discrimination even if the Commission accepted ACS's proposed conditions.[254] We are not willing, nor are we able under the Act, to forbear from dominant carrier regulations when to do so would be inconsistent with the public interest and would not promote competitive market conditions. Thus, we find that ACS has not made the required showing, and we therefore deny its request.

92. We therefore deny ACS's Petition to the extent it seeks conditional forbearance from the dominant carrier regulation that applies to interstate special access services. For the reasons explained above, we are unable to find on the present record that ACS has satisfied any of the three criteria of section 10 with respect to its requested relief for interstate special access services.

E. Requested Forbearance Relief Similar to Forbearance Granted Verizon by Operation of Law

93. In addition to ACS's request for similar forbearance relief to that granted in the Qwest Omaha Order, ACS also seeks relief comparable to that granted to Verizon by operation of law on March

(Continued from previous page)
dominant carrier regulation of its special access services generally on ACS being prohibited from withdrawing any currently available interstate access service absent GCI's approval. *See supra* note 179. As GCI explained, if the Commission were "unable to adopt each of the conditions to the forbearance requested by ACS, then for all the reasons previously set forth in detail in this record, GCI's opposition to the grant stands." GCI Aug. 10, 2007 *Ex Parte* Letter at 2.

[251] 47 U.S.C. § 160(a)(1), (2). *See*, *e.g.*, Sprint Nextel Reply at 3.

[252] 47 U.S.C. § 160(a)(3).

[253] *Id*. § 160(b).

[254] *See supra* para. 87.

19, 2006.[255] Specifically, as noted above, ACS seeks relief from regulation as a common carrier or telecommunications service provider for any packetized broadband services it offers or may offer in Anchorage.[256] ACS seeks the ability to offer all these services on a non-common carrier basis.[257] ACS states that it does not seek relief from universal service contribution obligations "to the extent [it] offers broadband services that remain subject to the obligation to contribute to universal service as 'telecommunications.'"[258] As discussed below, we grant in part ACS's request for forbearance from certain dominant carrier and Computer Inquiry obligations for specified existing enterprise broadband services.[259] As with the broadband forbearance discussed above, we condition this forbearance on the requirement that ACS must file, and have approved by the Commission, the cost allocation analysis described above, specifying how it will address the cost-shifting concerns arising from this forbearance action in light of its continuing to offer other interstate special access services on a rate-of-return basis.[260]

1. Dominant Carrier Regulation

a. Charges, Practices, Classifications, and Regulations

94. Section 10(a)(1) of the Act requires that we analyze whether the application of dominant carrier regulation to any broadband services ACS offers or may offer in Anchorage is necessary to ensure that the "charges, practices, classifications, or regulations . . . for [] or in connection with [those] . . . telecommunications service[s] are just and reasonable and are not unjustly or unreasonably discriminatory."[261] Our section 10(a)(1) analysis takes into account the effect of dominant carrier regulation on ACS's rates and practices by considering the overall marketplace for the services for which relief is sought and the customers that use them.[262] As discussed below, we conclude that it is appropriate to forbear from dominant carrier regulation as it applies to these services. In particular, mandating that ACS, but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements for the ACS-specified broadband services is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.

95. We begin our analysis by looking at the existing broadband services identified by ACS – Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services. These types of services are high-speed, high-volume services that

[255] ACS Petition at 6; *see also* Verizon-Related News Release, *supra* note 4; Verizon Forbearance Petition; Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter; Verizon WC Docket No. 04-440 Feb. 17, 2006 *Ex Parte* Letter.

[256] ACS June 29, 2007 *Ex Parte* Letter at 7; ACS July 25, 2007 *Ex Parte* Letter at 4-5.

[257] ACS June 29, 2007 *Ex Parte* Letter at 2 n.2 & 7.

[258] *See* ACS Petition at 7; ACS June 29, 2007 *Ex Parte* Letter at 7.

[259] Specifically, we grant ACS this relief for its interstate Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services and otherwise deny ACS's request for relief similar to that granted Verizon through operation of law. GCI states that "the scope of relief requested by Verizon is not clear," and thus asks that we deny ACS's request on that basis. GCI Motion to Dismiss at 4. We find instead that these circumstances counsel in favor of analyzing and clearly addressing ACS's request in the present Order.

[260] *See* GCI Reply at 2; *see also supra* Part IV.D.3.c (denying forbearance relief for certain special access services).

[261] 47 U.S.C. § 160(a)(1).

[262] *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505, para. 21.

enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data. Specifically, ACS's Transparent LAN, Transparent LAN Lite, and LAN Extension Networking Services use fiber optic or copper facilities to provide high-speed, Ethernet-based, point-to-point or multi-point interconnectivity for LANs and wide area networks (WANs).[263] Similarly, ACS's Video Transmission Services provide high-speed transmission links for teleconferencing, video jukeboxes, and programming distribution.[264] We find insufficient information to precisely define the existing boundaries for ACS's broadband transmission services offerings, and we thus focus our analysis on the services ACS identified in the record here generally.[265]

96. We note that the relief we grant ACS in Anchorage excludes TDM-based, DS-1 and DS-3 special access services,[266] and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.

97. We find that a number of entities currently provide enterprise broadband services.[267] With respect to the Anchorage study area specifically, we note the presence of GCI as a competitor in the enterprise market[268] as well as AT&T, which the evidence indicates is a significant provider for such services nationwide.[269]

98. We recognize that the record in this proceeding does not include detailed market share information for particular enterprise broadband services in the Anchorage MSA. However, we note that other available data suggest that there are a number of competing providers for these types of services and the marketplace appears highly competitive.[270] Moreover, as we discuss below, we find that competitors

[263] *See* ACS Tariff FCC No. 1, §§ 7.10.1; 7.11.1; ACS July 25, 2007 *Ex Parte* Letter at Exh. C.

[264] *See* ACS Tariff FCC No. 1, § 7.6.1; ACS July 25, 2007 *Ex Parte* Letter at Exh. C.

[265] *See, e.g. AT&T/BellSouth Order*, 22 FCC Rcd at 5698, para. 65 (explaining that the Commission was unable to define the precise boundaries of relevant transmission service markets due to insufficient evidence).

[266] ACS excludes "traditional TDM-based special access services used to serve business customers, such as DS1 and DS3 special access circuits," from the scope of its broadband relief request. ACS July 25, 2007 *Ex Parte* Letter at 4-5.

[267] *See AT&T/BellSouth Order,* 22 FCC Rcd at 5708, para. 82*; SBC/AT&T Order,* 20 FCC Rcd at 18332-33, para. 75*; Verizon/MCI Order,* 20 FCC Rcd at 18474-75, para. 76; *Qwest Section 272 Sunset Forbearance Order*, 20 FCC Rcd at 5244, para. 30; *see also* Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter at 7-9.

[268] *See*, *e.g.*, ACS Petition at 40-44; GCI Comments at 19; ACS Reply, Statement of Mark Enzenberger, Exh. D.

[269] *See* ACS June 29, 2007 *Ex Parte* Letter at 3 (stating ACS faces significant competition from GCI and other providers of broadband services in Anchorage); Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter at 7. We do not have data that allow us to evaluate more precisely AT&T's market shares for these or other services in the Anchorage study area. *See supra* Part IV.D.2.d.

[270] *See*, *e.g.*, Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter at 7 n.13 (citing a June 2005 analyst's estimated market shares for "primary" providers of enterprise data services: AT&T 35%, MCI 28%, Sprint 12%, ILEC 7%, Other 19%); *id*. at 7 n.14 (citing a June 2005 analyst's estimated market shares for "secondary" providers of enterprise data services: Sprint 31%, AT&T 16%, ILEC 16%, MCI 6%, Qwest 6%, Other 25%); *see generally id*. Attach. 2 (November 2003 analyst report estimating market shares of top providers of services to large enterprise customers: AT&T 26%, MCI 14%, Sprint 8%; and forecasting anticipated market shares for subsequent years). Although these data are not ideal, for example because they predate the recent BOC/interexchange carrier mergers, and the underlying information and methodologies are not available, as noted above, we do not give significant weight to such static market share information in any event.

either are providing, or readily could enter to provide, these services within Anchorage. In light of these factors, we do not find it essential to have such detailed information and would not give significant weight to static market share information in any event.[271]

99. We also observe the sophistication of the enterprise customers that tend to purchase these types of services. The Commission consistently has recognized that customers that use specialized services similar to the existing ACS-specified services demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge.[272] These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts.[273] This shows that such customers are likely to make informed choices based on expert advice about service offerings and prices and thus suggests that these users also are likely to be aware of the choices available to them.[274] The Commission has further found that the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers' own networks.[275] These services equate to substantial telecommunications expenditures for large enterprise customers, which supports the notion that these customers will continue to deal at the most sophisticated level with the providers of these services. Smaller enterprise customers, whose telecommunications requirements do not warrant the deployment of new facilities, tend to purchase less sophisticated services.

100. We recognize, of course, that the marketplace for enterprise broadband telecommunications services in the Anchorage study area is more modest than many other parts of the country as a whole, both in terms of enterprise customers' demands and in terms of the services the competing providers offer to meet those demands. We believe, however, that the customers that would typically purchase Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services within Anchorage, like enterprise customers in other parts of the nation, are the type of sophisticated purchasers of communications services that would be more than willing to switch service providers to obtain lower prices and/or improved service.[276] Many enterprise

[271] *See*, *e.g.*, *Worldcom/MCI Order,* 13 FCC Rcd at 18036-37, paras. 17-18; *see also DOJ/FTC Horizontal Merger Guidelines*, § 1.521 ("Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.").

[272] *See*, *e.g.*, *AT&T/BellSouth Order*, 22 FCC Rcd at 5699, para. 66; *SBC/AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60; *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7426, para. 17 (2001); *AT&T Reclassification Order*, 11 FCC Rcd at 3306, para. 65 (citing *Competition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5887, para. 39 (1991)).

[273] *See AT&T/BellSouth Order*, 22 FCC Rcd at 5708-09, paras. 81-82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, paras. 74-75; *see also Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

[274] *See AT&T/BellSouth Order*, 22 FCC Rcd at 5708-09, para. 82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *see also Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

[275] *Triennial Review Order*, 18 FCC Rcd at 17063, para. 129.

[276] *See*, *e.g.*, Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter, Attach. at 3.

customers, moreover, have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences. Other enterprise customers, including most of the enterprise customers in the Anchorage study area, have more regional or localized operations. But even the limited number of enterprise customers in Anchorage that might demand services of these types are able to solicit telecommunications services from other potential providers.[277]

101. We further find that competitors can readily respond should ACS seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for its Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services. Even in situations where competitors do not have the option of self-deploying their own facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may rely on special access services purchased from ACS at rates subject to price regulation.[278] In this regard, we note that the relief we grant ACS in this order excludes TDM-based, DS-1 and DS-3 special access services.[279] Moreover, as we discuss in more detail below, competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services within the Anchorage study area.[280]

102. We reject Time Warner Telecom's assertion that TDM-based loops cannot in many instances be used to provide packetized broadband services to enterprise customers.[281] We find that assertion to be inconsistent with Time Warner Telecom's public statements that Time Warner Telecom can "cost-effectively deliver . . . Ethernet [services] to customers anywhere," even "where it may be uneconomical" to build facilities connecting Time Warner Telecom's network to the customers' premises.[282] Indeed, we observe that Time Warner Telecom has been able to compete in the provision of Ethernet services by relying on special access TDM loops (in addition to its own facilities).[283] We also

[277] *See*, *e.g.*, ACS Petition at 41-42.

[278] *See*, *e.g.*, Sprint Nextel Reply at 2; Broadview Reply, Attach. 1 at 25-26 (noting the use of incumbent LEC special access services as inputs to competing enterprise broadband services); Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter at 14.

[279] Indeed, we do not grant ACS forbearance for TDM-based, DS1 and DS3 special access services or for other of its special access services more generally. *Supra* Part IV.D.3.c; *infra* para. 110. We note that the cost allocation conditions imposed on the forbearance relief granted for wireline broadband Internet access transmission service and enterprise broadband services will help the Commission to ensure that the rates for these inputs remain just and reasonable. Moreover, the rate regulation that will continue to apply to ACS's special access services provides protection against unreasonable rate increases by requiring carriers that seek rate increases to justify such increases by providing cost and other supporting data in the tariff review process. ACS bases its petition on the contention that the market for access services in the Anchorage study area is competitive and, in particular, on its need to be able to offer lower rates to meet competition. Accordingly, if ACS should seek to raise its generally available tariffed rates for its TDM-based special access services, such a filing would be reviewed with particular scrutiny.

[280] *See infra* para. 105.

[281] Time Warner Telecom Comments at 13-15; *see also* Broadview Reply, Attach. 2 at 7-8.

[282] *Time Warner Telecom and Overture Networks Provide Ethernet Anywhere*, Time Warner Telecom Press Release (June 6, 2006), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf.

[283] Specifically, Time Warner Telecom cites two declarations filed in the AT&T/BellSouth merger proceedings. *See* Time Warner Telecom Comments at 12-15 (citing Letter from Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. Reply Decl. of Graham Taylor (Taylor WC Docket No. 06-74 Reply Decl.); Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, Attach. Reply Decl. of Parley C. Casto (Casto WC Docket No. 06-74 Reply (continued….)

are unpersuaded by Time Warner Telecom's concern that reliance on TDM special access inputs gives rise to service or performance problems that hinder competition.[284] We agree that this argument is undercut by the fact that providers have been successfully competing for Ethernet services customers by relying on TDM inputs.[285] In addition, we observe that all ways of obtaining transmission capacity have trade-offs, including purchasing transmission services at wholesale and self-provisioning network transmission facilities, and we anticipate that competitors will explore various options in seeking to provide enterprise broadband services. For example, obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits.[286] Further, any transmission services typically are offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.[287] Finally, to the extent that commenters have a desire for expanded access to section 251 UNEs under the Commission's generally applicable unbundling rules, we find it more appropriate to consider such concerns in the context of an industry-wide proceeding applicable to all similarly-situated carriers, rather than in the context of a forbearance proceeding.[288]

103. In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of ACS's Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services is not necessary to ensure that ACS's rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. The competitive conditions persuade us that the contribution of tariffing requirements, and the accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is negligible. The Commission has recognized that tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market, and that they become unnecessary in a marketplace where the provider faces significant competitive pressure.[289]

104. For the same reasons, we find that continuing to subject ACS to dominant carrier

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Decl.)). These declarations indicate that Time Warner Telecom, among others, can use TDM special access services to offer retail Ethernet services. *See* Taylor WC Docket No. 06-74 Reply Decl. at para. 9 ("To the extent that TWTC has been able to deploy Ethernet services at retail in AT&T's region, it has done so using 1) its on-net facilities; 2) TDM loops purchased from AT&T; and 3) an extremely limited number of competitive facilities.") *cited in* Time Warner Telecom Comments; Casto WC Docket No. 06-74 Reply Decl. at para. 10 ("Numerous Ethernet providers, including TWTC, AT&T, and others, offer retail Ethernet services" by using "basic DS1 or DS3 special access circuits.").

[284] *See*, *e.g.*, Time Warner Telecom Comments at 14-15.

[285] *See*, *e.g.*, Casto WC Docket No. 06-74 Reply Decl. at para. 22.

[286] *See id*.

[287] For example, Time Warner Telecom notes that it would need to obtain two DS3s to provide a 50 Mbps Ethernet loop because DS3s provide approximately 45 Mbps of bandwidth. Time Warner Telecom Comments at 14. However, Ethernet supports data transfer rates in specific increments of 10 Mbps, 100 Mbps, and 1 Gbps. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY, 363, 364 (22nd ed., 2006). Thus, depending upon the capacity of service desired by a particular customer, it could well be necessary to purchase excess capacity of a wholesale Ethernet service, as well.

[288] *See*, *e.g.*, Broadview Reply, Attach. 2 at 7-8; *see also* 47 C.F.R. §§ 1.401-1.407 (providing for petitions for rulemaking).

[289] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738-68, paras. 14-66 (1996) (*IXC Forbearance Order*).

regulation in regard to its existing, identified non-TDM-based, packet-switched broadband services therefore is no longer appropriate in light of the market conditions. Such regulation is not necessary to ensure that ACS's charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as ACS is subject to the same regulatory obligations as its nondominant competitors that provide these services.[290]

105. We also find that ACS faces sufficient competitive pressure, either from actual or potential competitors, in its provision of the existing ACS-specified services because competing carriers are able to economically deploy OCn-level facilities to compete with ACS's offerings to the extent that there is demand for such services within the Anchorage study area. Specifically, we find, consistent with the Commission's findings in the *Triennial Review* and the *Triennial Review Remand Orders*, that, to the extent there is a demand for fiber loops at OCn capacity within that study area, competitive carriers such as GCI will be able to economically deploy these facilities to meet that demand.[291] We further find, consistent with this precedent, that OCn-level facilities produce revenue levels that can justify the high cost of loop construction.[292] Our precedent also makes clear that large enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.[293] Thus, we find it no longer appropriate to subject ACS to dominant carrier regulation for its specified, existing non-TDM-based, optical services.

106. Given the costs associated with dominant carrier regulation, we find that customers would benefit by our granting ACS relief from that regulation as it applies to the existing ACS-specified broadband services. In particular, the Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals' new offerings, and impose other unnecessary costs.[294] We find that continuing to apply dominant carrier regulation to ACS's existing broadband services would have each of these effects. Specifically, tariffing these services reduces ACS's ability to respond in a timely manner to its customers' demands for innovative service arrangements tailored to each customer's individualized needs.[295] In addition, by mandating that ACS provide advance notice of changes in its prices, terms, and conditions of service for these services, tariffing allows ACS's competitors to counter innovative product and service offerings even before they are made available to the public. In contrast, detariffing of these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs. Moreover, relief from advance notice requirements and cost-based pricing requirements would enable ACS to respond quickly and creatively to competing service offers. We find that tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the existing ACS-specified broadband services are just, reasonable, and not unjustly or unreasonably discriminatory. The better policy for consumers is to allow

[290] *See Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 39, 42. As stated above, we expect ACS to make a showing that adequately addresses cost shifting concerns arising from this forbearance action in light of its continuing to offer other interstate special access services on a rate-of-return basis.

[291] *Triennial Review Order*, 18 FCC Rcd at 17169, 17221, paras. 315, 389 (finding that requesting carriers are not impaired without OCn or SONET interface transport); *Triennial Review Remand Order*, 20 FCC Rcd at 2634, para. 183.

[292] *Triennial Review Order,* 18 FCC Rcd at 17169, para. 316.

[293] *Id*.

[294] *See*, *e.g.*, *AT&T Reclassification Order*, 11 FCC Rcd at 3288, para. 27.

[295] *See IXC Forbearance Order*, 11 FCC Rcd at 20760-61, para. 53.

ACS to respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions under which ACS offers these services.[296]

107. We find that eliminating these requirements would make ACS a more effective competitor for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace, thus helping ensure that the rates and practices for these services overall are just, reasonable, and not unjustly or unreasonably discriminatory. Forbearing from dominant carrier regulation of the ACS-specified broadband services will permit customers to take advantage of a more market-based environment for these highly-specialized services and allow petitioners the flexibility necessary to respond to dynamic price and service changes often associated with the competitive bidding process. In such a deregulated environment, the Commission's enforcement authority, along with market forces, will serve to safeguard the rights of consumers. ACS will continue to be subject to sections 201 and 202 of the Act in its provision of its existing specified broadband services, which, among other things, mandate that ACS provide interstate telecommunications services upon reasonable request and prohibit it from acting in an unjust or unreasonable manner or otherwise favoring itself in the provision of "like" services provided to unaffiliated entities.[297]

108. However, as with forbearance for wireline broadband Internet access transmission, discussed above, we find that forbearance from pricing regulation of these enterprise broadband services has implications for ACS's special access services generally, which remain subject to rate-of-return regulation.[298] In particular, the ratemaking process must account for the fact that, for example, the costs and revenues associated with ACS's provision of these services no longer should be included in its interstate rate-of-return calculations. ACS has not submitted a proposal for how these cost allocation issues would be addressed, nor do we find any other basis in the record for addressing these concerns. Thus, as with wireline broadband Internet access transmission service, discussed above, we condition forbearance on ACS filing, and having approved by the Commission, the cost allocation analysis described above, specifying how it will allocate its costs associated with the provision of the specified enterprise broadband services for ratemaking purposes.[299]

109. We also find that continued application of our dominant carrier discontinuance rules to

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[296] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27012-13, para. 22 (2002) (*SBC Advanced Services Forbearance Order*).

[297] 47 U.S.C. §§ 201-02. Specifically, we forbear from the following requirements with regard to ACS's provision of the specified existing broadband services within the Anchorage study area: (1) section 203 of the Act to the extent it requires ACS to file tariffs for these services as offered within that study area; and sections 61.31-61.38 of our rules to the extent they require ACS to file tariffs for these services as offered within that study area. *See IXC Forbearance Order*; *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); 47 C.F.R. §§ 61.31-61.38 (tariffing requirements for dominant carriers).

[298] *See*, *e.g.*, GCI Reply at 2 (stating that "unlike price cap regulation, rate-of-return regulation allows [incumbent LECs] to cross-subsidize and 'shift nonregulated costs to regulated services' with potentially disastrous consequences for competition" and that ACS "fails to even mention the potential for cost-shifting").

[299] For the same reasons discussed in the context of wireline broadband Internet access transmission service, we find that, absent this legal requirement, we would deny ACS's request for forbearance based on these cost allocation concerns. Thus, we likewise find that this is consistent with the statutory deadline imposed by section 10.

ACS's existing specified broadband services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as ACS is subject to the same treatment as nondominant carriers in relation to these services.[300] We conclude that subjecting ACS to a 60-day automatic grant period for discontinuance of its existing specified broadband services, and a 30-day comment period for notice to affected customers, is not necessary under section 10(a)(1), where nondominant carriers providing those same services are subject to a 30-day automatic grant period and 15-day comment period. However, to maintain sufficient customer protection and ensure the justness and reasonableness of ACS's practices in connection with these services, we predicate this finding upon ACS's compliance with the discontinuance rules that apply to nondominant carriers in the event it seeks to discontinue, reduce, or impair any of the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services for which we grant relief.[301] Similarly, we forbear from applying our domestic streamlined transfer of control rules to ACS as a dominant carrier of these services, conditioned upon treatment of ACS as a nondominant carrier for these services.[302]

110. We disagree with commenters that argue that forbearance should be denied because ACS controls bottleneck special access facilities and services that its competitors must access in order to provide their own broadband services.[303] As an initial matter, those commenters' concerns generally arise from the fact that ACS requested far greater forbearance relief than we grant in this order.[304] Here, we

[300] 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

[301] *Id*. § 63.71; *see Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

[302] *See Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43. Specifically, we forbear from applying sections 63.03, 63.19, 63.21, 63.23, and 63.60-63.90 of our rules to ACS's provision of the specified existing broadband services within the Anchorage study area to the extent that, and only to the extent that, ACS would be treated as a dominant carrier under these rules for no reason other than its provision of those services within that study area. 47 C.F.R. § 63.03 (procedures for domestic transfer of control applications); *id*. §§ 63.60-63.90 (definitions, rules, and procedures that apply to the discontinuance, reduction, outage, and impairment of services). To the extent that ACS otherwise would be treated as a dominant carrier under these rules, that treatment shall continue. *See Qwest Section 272 Sunset Forbearance Order,* 22 FCC Rcd at 5235-39, paras. 55-62.

[303] Time Warner Telecom Comments at 2, 11-15 (arguing that ACS still controls certain bottleneck facilities necessary to serve enterprise customers); GCI Comments at 4 (claiming that forbearance would injure competition in the retail market for broadband services because ACS would be able to engage in a price squeeze on customers that rely on its special access facilities); Broadview Reply at 4 (claiming that "ACS's dominance over the transmission facilities needed to provide end users competitive broadband services is unquestionable"); Sprint Nextel Reply at 2 (arguing that ACS controls the access services necessary to compete in the wholesale and enterprise markets).

[304] *See*, *e.g.*, Time Warner Telecom Comments at 5 n.7 ("For purposes of this opposition, the Joint Commenters assume the most expansive interpretation of ACS's request for relief with respect to the market for broadband transmission services provided to the enterprise market: that ACS seeks relief from Title II and dominant carrier regulation for both its packetized and TDM based broadband services sold to both retail and wholesale enterprise customers in the Anchorage MSA."); GCI Comments at 3-4 (stating that "ACS claims to seek forbearance from regulation of broadband services 'consistent with that granted to Verizon Telephone Companies,' but fails to acknowledge that, unlike Verizon, ACS simultaneously seeks forbearance from regulations of its circuit-switched special access transmission facilities"); Broadview Reply at 4 (stating that "any current retail competition in Anchorage exists at the mercy of regulatory requirements that ensure that competitors have access to *wholesale* inputs that currently only ACS can make available in the vast majority of locations throughout Anchorage"); Sprint Nextel Reply at 2 (noting that ACS's request for forbearance is "far broader than the limited forbearance granted to Qwest in the Omaha MSA and broader than the forbearance sought by Verizon and deemed granted last March").

deny ACS's requested relief from dominant carrier regulation of its special access services generally, ensuring that they remain subject to the full range of dominant carrier tariffing, pricing, and other regulatory obligations.[305] In particular, our forbearance excludes TDM-based, DS1 and DS3 special access services. This will ensure that ACS's competitors will continue to be able to obtain these services for use as inputs to their own retail broadband services.[306]

111. Further, while we do grant forbearance from dominant carrier regulations for the existing enterprise broadband services identified by ACS, we do not grant forbearance from Title II as a whole, but instead ensure that ACS remains subject to the same regulatory obligations applicable to other nondominant telecommunications carriers.[307] As the Commission concluded in the *Qwest Section 272 Sunset Forbearance Order*, "dominant carrier regulation is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from [an incumbent LEC's] control of any bottleneck access facilities that [the incumbent LEC's] competitors must access in order to provide competing services."[308] We find that to the extent dominant carrier regulation of ACS's existing specified broadband services addresses any exclusionary market power ACS may have in relation to those services, the burdens imposed by that regulation exceed its benefits.[309]

112. Our forbearance grant also is restricted to the identified broadband services that ACS presently offers, specifically its Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services. We find that limiting our forbearance grant to existing services is appropriate because we cannot, on the record before us, conclude that ACS will lack market power with regard to any theoretical broadband telecommunications services that it might offer in the future, since both the precise nature of those services and the competitive conditions existing at that future time are unknown.[310]

113. In sum, subject to the precondition we identify above, we find that dominant carrier regulation of the specified, existing enterprise broadband services is not necessary to ensure that the charges, practices, classifications, and regulations in connection with these services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1).

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[305] *See supra* Part IV.D.3.c. We find that concerns about the sufficiency of the Commission's existing regulation of the incumbent LECs' special access services are better addressed in the rulemaking context, where we can develop a comprehensive approach based on a full record that applies to all similarly-situated incumbent LECs. *See*, *e.g.*, Broadview Reply, Attach. 1 at 26.

[306] In addition, ACS remains subject to either section 251 unbundling obligations or the loop and subloop access condition by virtue of the *ACS UNE Order*, 22 FCC Rcd at 1960, para. 2 (conditioning forbearance relief from certain unbundling requirements on ACS's making loops and certain subloops available in certain wire centers in Anchorage at rates, terms, and conditions negotiated with GCI for Fairbanks, Alaska by the end of the established transition period until commercially negotiated rates are reached).

[307] *See infra* Parts IV.E.3 & IV.E.4.

[308] *Qwest Section 272 Sunset Forbearance Order,* 22 FCC Rcd at 5233, para. 52.

[309] *Id.*

[310] *See* ACS June 25, 2007 *Ex Parte* Letter at 5-6 (including within the scope of relief sought certain broadband services "whether offered by ACS now or in the future" and listing particular services ACS may offer in the future "only as examples of types of services for which ACS is seeking forbearance").

b. Protection of Consumers

114. Section 10(a)(2) of the Act requires us to determine whether dominant carrier regulation of ACS's existing and future broadband service offerings in Anchorage is necessary to protect consumers.[311] For reasons similar to those that persuade us that these regulations are not necessary within the meaning of section 10(a)(1), we also determine that their application to the existing ACS-specified services is not necessary for the protection of consumers. As we found above, ACS faces sufficient pressure from actual and potential competition to protect consumers, and to give ACS incentives to offer innovative services. In light of these conclusions, we find that the combination of dominant carrier tariffing requirements and the accompanying cost support can hinder, instead of protect, consumers' ability to secure better service offerings. Finally, as we explain below,[312] we are not forbearing from any public policy obligations applicable to these services, including those related to 911, emergency preparedness, customer privacy, or universal service, and consumers therefore do not lose protections in these important areas.

115. Conversely, we find that restricting our forbearance grant to those services ACS specified in its petition that it currently offers is necessary to protect consumers. ACS has not provided sufficient information regarding any broadband services, other than those specifically identified in its petition, and that it currently offers, to allow us to reach a forbearance determination under section 10(a).[313] Because the record before us does not indicate that ACS will face sufficient competitive pressure for future services if and when it ultimately offers them,[314] we cannot conclude that dominant carrier regulation of these as yet unoffered services is not necessary to protect consumers.

c. Public Interest

116. Section 10(a)(3) of the Act requires us to determine whether forbearance from dominant carrier regulation for ACS's existing and future broadband service offerings in Anchorage is consistent with the public interest.[315] In making this determination, section 10(b) of the Act directs us to consider whether forbearance from enforcing the provisions at issue will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. If we determine that forbearance will promote competition among providers of telecommunications services, that determination may be a basis for finding that forbearance is in the public interest.[316]

117. We agree with ACS that a deregulatory approach for its provision of the existing ACS-specified broadband services will serve the public interest by eliminating the market distortions that asymmetrical regulation of these services causes.[317] In particular, we find that dominant carrier regulation

[311] 47 U.S.C. § 160(a)(2).

[312] *See infra* parts IV.E.3, IV.E.4.

[313] *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50 (denying Qwest's petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination).

[314] *See supra* para. 112.

[315] 47 U.S.C. § 160(a)(3).

[316] *Id*. § 160(b).

[317] *See*, *e.g.*, ACS June 29, 2007 *Ex Parte* Letter at 7.

impedes ACS's efforts to compete effectively with nondominant providers of these services. Such regulation keeps ACS from responding efficiently and in a timely manner to any market-based pricing promotions, including volume and term discounts, or special arrangements that its competitors may offer. In particular, dominant carrier regulation of the existing ACS-specified broadband services makes it unnecessarily difficult for ACS to negotiate arrangements tailored to the needs of its enterprise customers, because its tariff filings necessarily provide competitors with notice of their pricing strategies and competitive innovations.

118. Forbearance from the application of dominant carrier regulation to the existing ACS-specified broadband services also will promote the public interest by furthering the deployment of advanced services.[318] Indeed, forbearance in this case is entirely consistent with section 706 of the Act and Congress' express goals of "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[319] Forbearance also is consistent with section 7(a) of the Act, which establishes a national policy of "encourag[ing] the provision of new technologies and services to the public."[320] In addition, for the reasons described above, we conclude that granting ACS this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b). By allowing ACS to compete more effectively in the provision of the broadband transmission services that it currently offers, forbearance from dominant carrier regulation of these services will enhance competition among providers in a manner consistent with the public interest. For these reasons, we disagree with commenters that contend that forbearing from the application of dominant carrier regulation to the petitioners' existing, non-TDM-based, packet-switched broadband services and existing, non-TDM-based, optical transmission services would be inconsistent with the public interest.[321]

119. Consistent with our determinations under sections 10(a)(1) and 10(a)(2),[322] we find that extending our forbearance from dominant carrier regulation to services that ACS does not presently offer would be contrary to the public interest. Specifically, because the record before us is insufficient to support a finding that ACS will lack market power with regard to these as yet unoffered services, we cannot conclude that forbearance in this instance would be consistent with the public interest.

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[318] Section 706(c)(1) of the 1996 Act, *codified at* 47 U.S.C. § 157 nt. The Commission has concluded that section 706 is not an independent grant of forbearance authority. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, *et al*., CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24044-48, paras. 69-77 (1998), *recon. denied*, 15 FCC Rcd 17044 (2000).

[319] 1996 Act Preamble, 110 Stat. at 56; *see* 47 U.S.C. § 157 nt. In section 706 of the 1996 Act, Congress directed the Commission to encourage, without regard to transmission media or technology, the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis through, among other things, removing barriers to infrastructure investment. Section 706 is reproduced in the notes to section 157 of the Act. *See* 47 U.S.C. § 157 nt. As we found in the *Wireline Broadband Internet Access Services Order*, regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest. *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14878, para. 45.

[320] 47 U.S.C. § 157(a).

[321] *See*, *e.g.*, Time Warner Telecom Comments at 11-15; Broadview Reply at 6; Sprint Nextel Reply at 1-3.

[322] *See supra* Parts IV.E.1.a and IV.E.1.b.

2. *Computer Inquiry* Requirements

120. As stated previously,[323] we construe ACS's petition as requesting relief from the *Computer Inquiry* obligations that apply to ACS in connection with any broadband information service it may provide in Anchorage. The *Computer Inquiry* rules require that ACS: (a) offer as telecommunications services the basic transmission services underlying its enhanced services; (b) offer those telecommunications services on a nondiscriminatory basis to all enhanced service providers, including its own enhanced services operations;[324] and (c) offer those telecommunications services pursuant to tariff.[325] For ease of exposition, we refer to these requirements as the transmission access requirement, the nondiscrimination requirement, and the tariffing requirement, respectively.

121. For the reasons described above, we find that forbearance from these requirements satisfies sections 10(a)(1) and 10(a)(2). In particular, as found above, providers of these types of transmission services face significant competitive pressure from providers that can deploy their own facilities or rely on regulated special access inputs. We find that these competitive pressures are sufficient to ensure that ACS's rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory and to protect consumers absent the *Computer Inquiry* requirements.

122. We conclude, however, that forbearance is not warranted with respect to the transmission access requirement or the nondiscrimination requirement because such forbearance would not be in the public interest pursuant to section 10(a)(3). These requirements apply to all non-BOC, facilities-based wireline carriers, including ACS's nondominant facilities-based competitors in the Anchorage study area, in their provision of enhanced services.[326] ACS itself asserts that removing any "regulatory asymmetry" under which ACS currently operates in that study area and subjecting it "to no less regulation than any competitive [LEC] providing interstate access services" will "promote the public interest."[327] Given this assertion, we find that forbearance from the *Computer Inquiry* transmission access and nondiscrimination requirements is not in the public interest within the meaning of section 10(a)(3), as it would confer a regulatory advantage on ACS in Anchorage vis-a-vis its facilities-based competitors offering information services.

123. In contrast, the reasons that persuade us to forbear from dominant carrier regulation generally with regard to ACS's existing specified broadband services also persuade us to forbear from the *Computer Inquiry* tariffing requirement to the extent ACS provides information services within the

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[323] *See supra* para. 112.

[324] *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231; *see CCIA v. FCC*, 693 F.2d 198, 205 (D.C. Cir. 1982).

[325] *Computer II Final Decision*, 77 FCC 2d at 475, para. 231. We note that, under the Commission's *Hyperion Forbearance Order*, which granted non-dominant carriers permissive detariffing of interstate interexchange access services, non-incumbent LECs, including ACS's competitors within the Anchorage study area, need not offer the basic transmission services underlying their enhanced services pursuant to tariff. *See Hyperion Telecommunications, Inc. Petition Requesting Forbearance, Time Warner Communications Petition for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Exchange Carriers*, CCB/CPD Nos. 96-3 and 96-7 and CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (*Hyperion Forbearance Order*).

[326] *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231.

[327] ACS Petition at 56.

Anchorage study area in conjunction with those broadband services.[328] Therefore, like its non-incumbent LEC competitors, ACS will be free to offer any information service that incorporates its Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services without, by virtue of such offering, being required to tariff the underlying telecommunications component of those services.[329]

124. This forbearance from the *Computer Inquiry* tariffing requirement does not extend to ACS's information services to the extent they incorporate telecommunications components other than ACS's Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services. As with our analysis of dominant carrier regulation of ACS's broadband services,[330] we find that restricting our forbearance from *Computer Inquiry* obligations to services that incorporate these existing broadband telecommunications services is appropriate because we cannot conclude, on the record before us, that ACS will lack market power with regard to any as yet unoffered broadband telecommunications services. We also cannot find, on this record, that additional forbearance from the *Computer Inquiry* rules would meet the statutory forbearance criteria.

3. General Title II Economic Regulation

125. As part of its request for similar relief to that granted to Verizon by operation of law, ACS seeks forbearance from any economic regulation that would apply to it, under Title II and the Commission's implementing rules, in connection with its existing and future broadband services offerings in the Anchorage study area.[331] We first address this regulation as it applies to ACS as a common carrier or LEC. We then turn to this regulation as it applies to ACS as an incumbent LEC or independent incumbent LEC.

a. Regulation Applied to ACS as a Common Carrier or LEC

126. Title II and the Commission's implementing rules impose economic regulation on common carriers or LECs generally, regardless of whether they are incumbents or competing carriers. This regulation, though much less burdensome than the regulation imposed on dominant carriers, has been thought to provide important protections against unjust, unreasonable, and unjustly or unreasonably discriminatory treatment of consumers.[332] For example, section 201 of the Act mandates that all carriers

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[328] *See supra* Part IV.E.1.

[329] *See supra* note 334. As a practical matter, however, we note that the existing specified broadband services all appear to be transmission services that ACS chooses to offer on a common carrier basis today, and thus remain subject to the same Title II regulation applicable to nondominant carriers.

[330] *See supra* Part IV.E.1.

[331] In its June 25, 2007 *Ex Parte* Letter, ACS asserts that "[i]n this proceeding, ACS has used the phrase 'forbearance from Title II regulation' as shorthand for forbearance from classification as a 'telecommunications service' under the Communications Act." ACS June 25, 2007 *Ex Parte* Letter at 5. As an initial matter, ACS has not explained how a *classification* of its services is, in itself, a "regulation" or "provision of this Act" from which the Commission can forbear under section 10. 47 U.S.C. § 160(a). We note that certain "regulation[s]" and "provision[s] of this Act" do apply by virtue of a particular classification. With respect to such requirements, we find forbearance for enterprise broadband services is warranted in part, subject to the conditions discussed above. We otherwise deny forbearance for ACS's enterprise broadband services. *See* Parts IV.E.3, IV.E.4. We conclude that this analysis appropriately addresses ACS's request for forbearance for its enterprise broadband services.

[332] *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, (continued….)

engaged in the provision of interstate or foreign communications service provide such service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable.[333] Section 202 of the Act makes it unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons.[334] All telecommunications carriers are obligated under section 251(a)(1) of the Act to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[335] Section 251(b), moreover, imposes a number of duties on LECs, including the duty not to impose unreasonable or discriminatory conditions or limitations on resale of their telecommunications services,[336] the duty to implement number portability,[337] and the duty to provide competing telecommunications service providers with access to the LECs' poles, ducts, and conduits under just and reasonable rates, terms, and conditions.[338]

127. Although, as discussed above,[339] the Commission has relaxed tariffing, transfer of control, and discontinuance regulation for carriers that lack market power, nondominant carriers are still subject to limited regulation in these areas. In particular, section 214 of the Act requires common carriers to obtain Commission authorization before constructing, acquiring, operating or engaging in transmission over lines of communications, or discontinuing, reducing or impairing telecommunications service to a community.[340] The Commission's discontinuance rules for nondominant carriers require such carriers to file applications with the Commission and provide notice to the affected customers.[341] These applications are automatically granted on the 31st day unless the Commission notifies the applicant otherwise.[342] Moreover, to the extent they are permitted to file interstate tariffs, nondominant carriers must comply

(Continued from previous page)
Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16865-72, paras. 15-31 (1998) (*PCIA Forbearance Order*) (denying PCIA's request for forbearance from sections 201 and 202 of the Act and noting that these provisions "codify[] the bedrock consumer protection obligations of a common carrier").

[333] 47 U.S.C. § 201.

[334] *Id*. § 202.

[335] *Id*. § 251(a)(1).

[336] *See*, *e.g.*, *id*. § 251(b)(1).

[337] *Id*. § 251(b)(2).

[338] *See*, *e.g.*, *id*. §§ 224, 251(b)(4).

[339] *See supra* para. 7.

[340] 47 U.S.C. § 214. *See*, *e.g.*, *Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, para. 8 (2003) (applying five factors to determine whether "reasonable substitutes are available" to consumers). In 1999, the Commission granted all carriers blanket authority under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11372, para. 12 (1999); 47 C.F.R. § 63.01(a). We also note that, in certain instances, the Commission has granted conditional blanket discontinuance authority to carriers under section 214. *See Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14907-08, paras. 100-101.

[341] 47 C.F.R. § 63.71(c).

[342] *Id*.

with the streamlined tariffing and notice requirements of part 61, subpart C of the Commission's rules.[343]

128. We conclude that ACS has failed to demonstrate that forbearance from these, and other, economic regulations that apply generally to nondominant telecommunications carriers and to LECs would meet the statutory forbearance criteria. Indeed, with respect to its interstate broadband telecommunications services, ACS seems to ask us to go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow it to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in regulatory treatment between ACS and its competitors.[344] We find, based on the record before us, that granting ACS such preferential treatment would be inconsistent with the market opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power. For example, the protections provided by sections 201 and 202(a), coupled with our ability to enforce those provisions in a complaint proceeding pursuant to section 208, provide essential safeguards that ensure that relieving ACS of tariffing obligations in relation to the ACS-specified broadband services will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with those services.[345] Accordingly, we cannot find that enforcement of these statutory and regulatory requirements is not necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with [the broadband services at issue in this proceeding] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1).[346]

129. ACS also has not shown how continued enforcement of these economic regulation requirements in connection with the ACS-specified broadband services is not necessary for the protection of consumers within the meaning of section 10(a)(2) or how forbearance is consistent with the public interest within the meaning of section 10(a)(3).[347] On the contrary, disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.[348] In particular, many of the obligations that Title II imposes on carriers or LECs generally, including interconnection obligations under section 251(a)(1) and pole attachment obligations under sections 224 and 251(b)(4), foster the open and interconnected nature of our communications system, and thus promote competitive market conditions within the meaning of section 10(b). Allowing ACS, but not its competitors, to avoid these obligations would undermine, rather than promote, competition among telecommunications services providers within the meaning of that provision. Moreover, in originally subjecting nondominant carriers to streamlined transfer of control, discontinuance, and tariffing requirements, the Commission necessarily determined that these

[343] *See id*. §§ 61.18 *et seq*.

[344] We note that this request appears inconsistent with ACS's arguments that asymmetric regulation of its telecommunications services is impeding competition and that it should "be subject to no less regulation than any competitive local exchange carrier." *See* ACS Petition at 52, 56; *see* ACS June 29, 2007 *Ex Parte* Letter at 7 (arguing that ACS should be permitted to discontinue services using the streamlined procedures available to nondominant carriers).

[345] *See*, *e.g.*, *SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27010, 27012, paras. 18, 21 (citing 47 U.S.C. §§ 201-02, 208); *PCIA Forbearance Order*, 13 FCC Rcd at 16865-72, paras. 15-31.

[346] 47 U.S.C. § 160(a)(1).

[347] *Id*. §§ 160(a)(2), (a)(3).

[348] *See*, *e.g.*, *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14865, para. 17 (creating a regulatory and analytical framework that is consistent across different platforms that supports competing services).

requirements were needed to protect the public interest and competitive markets in situations where a carrier lacks market power.[349] Granting ACS, but not its competitors, forbearance from these and the other obligations that apply generally to common carriers, LECs, or nondominant carriers would result in disparate regulatory treatment for the same or similar services, create market distortions, and fail to protect consumers within the meaning of section 10(a)(2).[350] Accordingly, we deny ACS's forbearance request to the extent it seeks forbearance from Title II economic obligations, including those discussed above, that apply generally to telecommunications carriers or LECs.

b. Regulation Applied to ACS as an Incumbent LEC or Independent Incumbent LEC

130. Title II and the Commission's implementing rules also impose regulation on ACS in its capacities as an incumbent LEC and an independent incumbent LEC. For example, section 251(c) of the Act imposes interconnection, unbundling, and resale obligations on ACS in its capacity as an incumbent LEC. In addition, like other independent incumbent LECs, ACS is subject to structural separation requirements if it wishes to provide in-region, interstate, interexchange telecommunications services other than through resale.[351]

131. We conclude that the record before us does not show that forbearance from these, and other, economic regulations that apply generally to incumbent LEC or independent incumbent LECs would meet the statutory forbearance criteria. Indeed, the record contains no specific information regarding whether application of these regulatory requirements is not necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with [the ACS-specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1).[352] Nor does the record suggest how continued enforcement of these requirements in connection with the ACS-specified broadband services is not necessary for the protection of consumers or inconsistent with the public interest. We therefore deny ACS's forbearance request to the extent it seeks forbearance from Title II economic obligations, including those discussed above, that apply generally to incumbent LECs or independent incumbent LECs.[353]

4. Public Policy Regulation

132. As part of its request for similar relief to that granted to Verizon by operation of law, ACS seeks forbearance from any public policy regulation that would apply to it, under Title II and the Commission's implementing rules, in connection with its existing and future broadband services offerings in the Anchorage study area. We now turn to this request.

133. Title II and the Commission's implementing rules set forth numerous public policy requirements that apply generally to all carriers, regardless of whether they are incumbents or competing

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[349] *See*, *e.g.*, *IXC Forbearance Order*, 11 FCC Rcd at 20776-77, paras. 84-85.

[350] 47 U.S.C. § 160(a)(2).

[351] 47 C.F.R. § 64.1903.

[352] 47 U.S.C. § 160(a)(1).

[353] We note that in the *ACS UNE Order*, the Commission granted ACS conditional forbearance from the unbundling requirements of section 251(c) in certain wire centers in the Anchorage study area. *See ACS UNE Order*, 22 FCC Rcd at 1959-60, paras. 1-2. Nothing in the present order contravenes the conditional forbearance in place as a result of the *ACS UNE Order*.

carriers. These requirements advance critically important national objectives, such as ensuring the sufficiency of universal service support mechanisms, promoting access to telecommunications services by individuals with disabilities, protecting customer privacy, and increasing the effectiveness of emergency services, among other objectives. For example, section 254(b) of the Act states that "[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service."[354] Section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to universal service.[355] These universal service provisions ensure that all Americans, including consumers living in high-cost areas, low income consumers, eligible schools and libraries, and rural health care providers, have access to affordable telecommunications services.[356]

134. Similarly, Congress enacted section 225 of the Act to require each common carrier offering voice telephone service to also provide telecommunications relay service (TRS) so that individuals with disabilities will have equal access to the carrier's telecommunications network.[357] Moreover, section 255 sets forth disability access network requirements, and 251(a)(2) prohibits telecommunications carriers from installing any "network features, functions, or capabilities" that do not comply with the disability access requirements in section 255.[358] With regard to customer privacy, certain provisions in section 222 of the Act restrict telecommunications carriers' use and disclosure of customer proprietary network information (CPNI).[359] In these provisions, Congress recognized that telecommunications carriers are in a unique position to collect sensitive personal information and that consumers maintain an important privacy interest in protecting this information from disclosure and dissemination.[360] Other section 222 provisions increase the effectiveness of emergency services by facilitating the provision of vital caller location and subscriber identification information to emergency service providers.[361] We note that ACS's obligations under the Communications Assistance for Law

[354] 47 U.S.C. § 254(b)(5). The Commission has emphasized that maintaining the long-term viability of universal service programs is a fundamental goal that must continue to be met in an evolving telecommunications marketplace in which customers are migrating to broadband service platforms. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24954-56, paras. 1-5 (2002).

[355] 47 U.S.C. § 254(d).

[356] *See generally id*. § 254.

[357] *Id*. § 225. TRS enables an individual with a hearing or speech disability to communicate by telephone or other device with a hearing individual. This is accomplished through TRS facilities that are staffed by specially trained communications assistants (CAs) using special technology. The CA relays conversations between persons using various types of assistive communication devices and persons who do not require such assistive devices. *See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, para. 2 (2000).

[358] 47 U.S.C. §§ 251(a)(2), 255.

[359] *Id*. § 222(a)-(c), (f). CPNI is defined to include "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." *Id*. § 222(h)(1).

[360] *See generally id*. § 222.

[361] *Id*. § 222(d)(4), (g).

Enforcement Act (CALEA) are governed by the CALEA statute,[362] and ACS remains obligated to comply with those statutory requirements.

135. We find that ACS has not shown that forbearance from these and the other public policy requirements in Title II and the Commission's implementing rules meets the statutory forbearance criteria. We note that ACS does not seek forbearance from any universal service contribution obligations that arise from its provision of broadband services that include "telecommunications."[363] We believe that by excluding this relief from its forbearance request, ACS recognized that the public interest requires it to maintain its universal service support obligations. Nevertheless, we include those obligations in our forbearance analysis to ensure that there is no ambiguity with regard to ACS's continuing duty to include revenues from each of the ACS-specified broadband services in its federal universal service support calculations.

136. In particular, we conclude on the record before us that forbearing from the public policy requirements in Title II and the Commission's implementing rules would be inconsistent with the critical national goals that led to the adoption of these requirements. Neither ACS nor other parties have submitted evidence demonstrating that enforcement of these requirements is unnecessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with [the ACS-specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1) of the Act,[364] or is not necessary for the protection of consumers within the meaning of section 10(a)(2) of the Act.[365] On the contrary, we believe that consumers will continue to receive essential protections from the continued application of these requirements in connection with ACS's packet-switched and optical broadband telecommunications services.

137. We further conclude based on the record that removing ACS's public policy obligations would be contrary to the public interest within the meaning of section 10(a)(3) of the Act. ACS itself asserts that removing any "regulatory asymmetry" under which ACS currently operates in the Anchorage study area and subjecting it "to no less regulation than any competitive [LEC] providing interstate access services" will "promote the public interest."[366] The Commission likewise has found that disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.[367] Thus, exempting ACS from public policy obligations that apply to ACS's actual and potential competitors for the specified broadband services would undermine the public policy goals behind those obligations, and would fail to promote competitive market conditions in the manner contemplated by section 10(b) of the Act. Moreover, the Commission recently has found it in the public interest to extend a number of these obligations to entities that have not

[362] *Id*. § 229; *see also* Pub. L. No. 103-414, 108 Stat. 4279 (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

[363] ACS Petition at 7; ACS June 29, 2007 *Ex Parte* Letter at 7 n.22; *see* 47 U.S.C. § 254(a) (directing that "any other provider of interstate telecommunications [*i.e.*, any interstate telecommunications provider that does not provide interstate telecommunications services] may be required to contribute to" federal universal service support).

[364] 47 U.S.C. § 160(a)(1).

[365] *Id*. § 160(a)(2).

[366] ACS Petition at 56.

[367] *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14865, para. 17 (creating a regulatory and analytical framework that is consistent across different platforms that support competing services).

been classified as "telecommunications carriers" to protect competition and consumers.[368] In the face of these recent conclusions, we find no basis in the record to demonstrate why it is not in the public interest to retain these obligations for ACS. For these reasons, we deny ACS's forbearance request to the extent it seeks forbearance from the public policy requirements in Title II and our implementing rules.

V. EFFECTIVE DATE

138. Consistent with Section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Monday, August 20, 2007.[369] The time for appeal shall run from the release date of this order.[370]

VI. ORDERING CLAUSES

139. Accordingly, IT IS ORDERED that, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, ACS's Petition for forbearance IS GRANTED to the extent described herein and otherwise IS DENIED.

140. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201, 202, 203, 205, 218, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201, 202, 203, 205, 218, and 403, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, sections 54.901(a), 54.903 and 69.3(e)(9) of the Commission's rules, 47 C.F.R. §§ 54.901(a), 54.903 and 69.3(e)(9) ARE WAIVED to the extent provided herein.

141. IT IS FURTHERED ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), this Order SHALL BE EFFECTIVE on August 20, 2007. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

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[368] *See Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, paras. 38-49 (2006), *aff'd in part, vacated in part*, *Vonage Holdings Corp. v. FCC*, No. 06-1276 (D.C. Cir. June 1, 2007); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57, paras. 54-59 (2007); *IP-Enabled Services*, WC Docket No, 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, FCC 07-110 at paras. 17-31 (rel. Jun. 15, 2007).

[369] *See* 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

[370] *See* 47 C.F.R. §§ 1.4, 1.13.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX
LIST OF COMMENTERS

Comments in WC Docket No. 06-109

Comments	Abbreviation
ACS of Anchorage, Inc.	ACS
General Communication, Inc.	GCI
Time Warner Telecom, Inc., Cbeyond Communications, LLC, and One Communications Corp	Time Warner Telecom

Replies in WC Docket No. 06-109

Replies	Abbreviation
ACS of Anchorage, Inc.	ACS
Broadview Networks, Covad Communications, Eschelon Telecom, Inc., Nuvox Communications, XO Communications, Inc., Xspedium Management Company LLC, and Yipes Enterprise Services Inc.	Broadview
General Communication, Inc.	GCI
Sprint Nextel Corporation	Sprint Nextel

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Docket No. WC 06-109

Broadband access is essential to an expanding Internet-based information economy. Promoting broadband deployment is one of the highest priorities of the FCC. To accomplish this goal, the Commission seeks to establish a policy environment that facilitates and encourages broadband investment, allowing market forces to deliver the benefits of broadband to consumers. Today, we take another step in establishing a regulatory environment that encourages such investments and innovation by granting ACS's petition for regulatory relief of its broadband infrastructure and fiber capabilities. This relief will enable ACS to have the flexibility to further deploy its broadband services and fiber facilities without overly burdensome regulations.

The relief afforded to ACS is consistent with and similar to the relief provided in Commission decisions regarding broadband services, packet switching, and fiber facilities. In those decisions, the Commission determined to relax regulations where competition was significant and where regulations acted as a disincentive to deploy new broadband technologies. Accordingly, based on the specific market facts that have been placed before us, we are compelled under the "pro-competitive, deregulatory" framework established by Congress, as well as under section 10's forbearance criteria, to grant ACS relief from the continued application of legacy regulations.

**JOINT STATEMENT OF
COMMISSIONER MICHAEL J. COPPS AND
COMMISSIONER JONATHAN S. ADELSTEIN,
CONCURRING IN PART, DISSENTING IN PART**

Re: *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109*.

In today's decision, the Commission addresses a wide-ranging forbearance petition concerning the appropriate regulation of the incumbent local exchange carrier in the unique circumstances of Anchorage, Alaska. Anchorage is a relatively small market, geographically removed from the lower 48 states. Moreover, a competitive facilities-based carrier has extensively built out its network and has taken significant market share for certain services from the incumbent provider. Because we find that this Order is inconsistent in its consideration of these factors, we concur in part and dissent in part.

We support this Order's decision to grant conditional relief in Anchorage for certain services where there is clear evidence of a vigorous rivalry between the incumbent cable and wireline provider; where there are few, if any, other competitors seeking to enter the market; and where the principal competitors previously reached a long-term commercial agreement that may in fact foster competition in the mass market. However, we continue to have concerns with a general approach that suggests that consumers should be satisfied with only two providers. The goal of the Telecommunications Act of 1996 is to establish a competitive and de-regulatory telecommunications environment. While today's order reduces regulation by eliminating some incumbent obligations and demonstrates that the Commission can respond to a dynamic marketplace, the Commission relies on the intermodal efforts of a single alternative provider to conclude that sufficient competition exists. While we concur in the forbearance of certain regulations based on the aforementioned factors that affect the unique Anchorage market, we believe the statute contemplates more than just competition between a wireline and cable provider.

Moreover, the Commission is forced to craft a novel litany of conditions in order to grant forbearance in this case. While we appreciate the efforts of the parties and the Bureau to limit potential adverse effects of this decision on universal service, access charges, consumer prices, and for cost allocation purposes, here we create an almost entirely new regulatory structure out of whole cloth. It will be important for the Commission to monitor the effects of these safeguards, and we encourage the Commission to diligently verify whether its predictions about their sufficiency are accurate.

For business customers, this Order is a particularly mixed bag. We support the decision to deny relief from the Commission's existing pricing rules for "traditional TDM-based" special access services, for which relief the Order finds a lack of evidence about market shares and the development of competitive forces. Yet, in an inexplicable turn, the Commission forbears from the pricing rules for other special access services, referred to in this Order as enterprise broadband services. While we appreciate the Commission's effort not to rely explicitly on generalized marketplace conditions for these services or to characterize explicitly the marketplace as nationwide, in doing so it is left with an Order that it is devoid of virtually any analysis. The Order readily admits "that the record in this proceeding does not include detailed market information for particular enterprise broadband services in the Anchorage MSA." Much of the data pointed to for support is in fact for services offered by providers everywhere but Anchorage. In addition, the Commission finds that "potential" competition is sufficient to forbear from regulation. In places where substantial competition does not demonstrably exist, it seems that forbearance actually can make the problem worse as "potential" competitors will have even less ability to successfully

compete. These kinds of decisions are too important to be made without the in-depth market analysis that might support them. Recent Congressional hearings have demonstrated to us a growing impatience with policymaking via analysis-poor forbearance decisions. The Commission needs to mend its ways.

While we certainly appreciate the Order's decision to retain key interconnection, universal service, privacy, disabilities access, and other Congressionally-mandated provisions -- forbearance from which would have been devastating for consumers and competition -- we cannot support this Order's decision to forbear from rules that provide critical pricing protection. We hope that the grant of forbearance here, without analysis of specific market forces and conditions, is not an ominous sign for customers in other regions of the country, many who have fewer options than those available in Anchorage.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Docket No. WC 06-109.

In this decision we once again recognize the significant facilities-based competition that exists in the Anchorage market between the incumbent local exchange carrier, ACS of Anchorage, Inc. (ACS) and other carriers such as General Communications, Inc. (GCI). I support moving away from regulation where the record shows that a competitive market exists, rendering those regulations unnecessary. Today's Order takes a carefully balanced approach, providing regulatory relief to the incumbent ACS in areas in which GCI has captured significant market share and is capable of serving a significant proportion of the consumers in the market over its own network, but denying relief where the state of facilities-based competitive entry does not yet warrant regulatory forbearance. Accordingly, I support today's Order removing legacy regulations where robust competition has rendered those regulations no longer necessary to maintain a competitive market.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109

I support the relief from regulation that is granted in this forbearance petition filed by ACS of Anchorage, Inc. (ACS). The Anchorage, Alaska study area is a unique market, where the incumbent local exchange carrier, ACS, faces significant facilities-based competition from other carriers, primarily General Communication Inc. (GCI). For instance, GCI purportedly has over one-half of the exchange access market and 60 percent of the high-speed Internet market in Alaska. In addition, the geographic location of Anchorage contributes to the special characteristics of that market that are not duplicated in any other market in the country. With regard to ACS's enterprise broadband services, forbearance from regulating those services is appropriate based on the level of competition it faces in the Anchorage market, not only from GCI but also from AT&T and other providers. I believe that a local market analysis, rather than a national market analysis, is the correct basis for determining whether this type of relief is warranted.

The competitive situation facing ACS, a rate-of-return carrier, in the Anchorage market provides a poster child for deregulation of the services covered in this order. Forbearance from regulation in this instance is good for everybody and should reap benefits for all concerned, including customers of the deregulated services, particularly in light of the conditions we impose.